Supreme Court, U.S.
FILED
AUG 9 1999
OFFICE OF THE CLERK

No. 99 247

IN THE
Supreme Court of the United States

PHILIP FREEDMAN,
Petitioner,

v.

MARGARITE J. MCCANDLESS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. COSTOPOULOS
COSTOPOULOS, FOSTER & FIELDS
831 Market Street
P.O. Box 222
Lemoyne, Pennsylvania 17043
(717) 761-2121

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

88 pp

QUESTIONS PRESENTED FOR REVIEW

In state proceedings, the Domestic Relations Section of the Dauphin County Domestic Relations Court represented and interceded on behalf of a welfare client in a paternity litigation before the Domestic Relations Court. The Domestic Relations Court then directed a paternity verdict against the Petitioner on the basis of a Domestic Relations Court Section contract testing laboratory report. This document disregarded the Petitioner's genetic exclusion as a parent of the subject child. The following questions are presented by this Petition:

(1) Does a conclusive presumption of paternity based on unreliable and subjective scientific opinion evidence violate due process of law?

(2) Does intercession by a section of a court on behalf of a complainant in a paternity litigation before the court violate a defendant's due process of law?

PARTIES TO THE PROCEEDING

The Petitioner in this case is Philip Freedman.

The Respondent is Margarite McCandless.

Notice that the constitutionality of a Pennsylvania statute has been raised was given to the Pennsylvania State Attorney General during lower court state proceedings (App. 35a-40a). To date, the State of Pennsylvania has not intervened in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
CITATIONS OF REPORTS OF THE STATE COURTS	1
BASIS FOR JURISDICION	1
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
1. Initial Proceedings	3
2. Appointment of Special Counsel	4
3. Proceedings Relating to Reversal of the August 1992 Paternity Order	5
4. Proceedings on Remand	6
5. Arguments Below—An Irrebutable Presumption of Paternity Based on Unreliable and Subjective Scientific Opinion Evidence Violates Due Process of Law	9
6. Arguments Below—Intercession by a Section of a Court on Behalf of a Complainant in a Paternity Litigation Before the Same Court Violates a Defendant's Due Process of Law	11
REASONS FOR ALLOWANCE OF THE WRIT	14
I. THE PENNSYLVANIA COURT OF LAST RESORT HAS DECIDED IMPORTANT DUE PROCESS OF LAW QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT	15

TABLE OF CONTENTS—Continued

Page

A. The Conclusive Presumption of the Pennsylvania Genetic Test Statute Violates Due Process of Law Under the Fourteenth Amendment to the United States Constitution 15

B. Intercession by a Section of a Court on Behalf of a Complainant in a Paternity Litigation Before the Court Violates Due Process of Law 20

II. THE PENNSYLVANIA COURT OF LAST RESORT HAS DECIDED IMPORTANT DUE PROCESS OF LAW QUESTIONS WHICH WILL HAVE FAR REACHING SOCIAL CONSEQUENCES IF PERMITTED TO STAND.... 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

	Page
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)	21, 23
Freedman v. McCandless, 654 A.2d 529 (Pa. 1995)	13
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	21
Heiner v. Donnan, 285 U.S. 312 (1932)	20
Little v. Streater, 452 U.S. 1 (1981)	21
McFarland v. American Sugar Refinery Co., 241 U.S. 899 (1916)	16, 20
Minnich v. Rivera, 509 Pa. 588 (1986), affirmed 483 U.S. 574	19, 20
In re Murchison, 449 U.S. 133 (1955)	21, 23
Olsen v. Dietz, 500 A.2d 125 (Pa. 1985)	11
Schlesinger v. Wisconsin, 270 U.S. 230 (1924)	20
Tumey v. Ohio, 273 U.S. 510 (1927)	23
United Artists 829, Brotherhood of Painters and Allied Trades, AFL-CIO v. NLRB, 762 F.2d 1027 (Fed. Cir. 1985)	20

RULES AND STATUTES

U.S. CONST., Art. XIV, § 1	2
28 U.S.C. § 1257	1
42 U.S.C. § 601 *et seq.* (1988)	4, 12
42 U.S.C. § 603(a)	4
42 U.S.C. § 603(h)	4
42 U.S.C. § 651 *et seq.*	4
42 U.S.C.A. § 652(g)	18
42 U.S.C. § 652(g)(1)	4
MASS. ANN. LAWS ch. 209C § 17 (West 1998)	20
MINN. STAT. ANN. § 257.62 (West 1987)	20
23 PA. CONS. STAT. § 4343(c) (West 1994)	2
SUP. CT. R. 11	1

PUBLICATIONS

D. H. Kaye, *DNA Paternity Probabilities*, 24 MED. TRIAL TECH. Q., No. 3 (1990) at 301-304	18
J. S. Mayersak, *DNA Fingerprinting Problems for Resolution*, 36 MED. TRIAL TECH. Q., No. 36, (1990) at 441-449	10, 18

TABLE OF AUTHORITIES—Continued

Page

J. S. Mayersak, *DNA Fingerprinting: A Discussion of the Various Sources of Error in the Current System*, 41 MED. TRIAL TECH. Q., No. 1 (1994) at 34-44 ..... 10, 18

Pamela L. Reading and Emily G. Reisner, *The Effect of Differences in Gene Freqency on Probability of Paternity*, 30 J. FORENSIC SCI., (Oct. 1995) at 1130 10

John R. Taylor, AN INTRODUCTION TO ERROR ANALYSIS, THE STUDY OF UNCERTAINTIES IN PHYSICAL MEASUREMENTS, 3 (2d ed. 1997) 10

IN THE

Supreme Court of the United States

No. ———

PHILIP FREEDMAN,

Petitioner,

v.

MARGARITE J. MCCANDLESS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

CITATIONS OF REPORTS OF THE STATE COURTS

The opinions of the Dauphin County Domestic Relations Court, the Pennsylvania Superior Court and the Pennsylvania Supreme Court are unreported. The opinions are included in the Appendix (App. 1a-34a).

BASIS FOR JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on May 12, 1999. Rehearing was not requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as revised in the Act of June 27, 1988. This Petition is filed under this Court's Rule 11 (Sup. Ct. R. 11).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. Fourteenth Amendment to the U.S. Constitution

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., Art. XIV, § 1.

2. Pennsylvania's Genetic Test Statute

> (a) Determination—Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court in a civil action without a jury unless either party demands trial by jury. The burden of proof shall be by a preponderance of the evidence.
>
> (b) Genetic tests.—
>
> > (1) Upon the request of any party to an action to establish paternity, the court shall require the child and the parties to submit to genetic tests.
> >
> > (2) Genetic test results indicating a 99% or greater probability that the alleged father is the father of the child shall create a presumption of paternity which may be rebutted only by clear and convincing evidence that the results of the genetic tests are not reliable in that particular case.

Genetic Test Statute, 23 PA. CONS. STAT. § 4343(c) (West 1994).

STATEMENT OF THE CASE

On March 6, 1990, Respondent filed a paternity complaint against the Petitioner in Dauphin County, Pennsylvania for support of a child, Grant Thomas Haxall ("Haxall child"). The Haxall child was born on September 5, 1987. At the birth, Mr. Tom Haxall ("Mr. Haxall") acknowledged paternity. He and Respondent named Mr. Haxall as the father on the Haxall child's registered birth certificate. Thereafter Respondent, Mr. Haxall and the Haxall child lived together at Mr. Haxall's home in Harrisburg, Pennsylvania. Respondent, Mr. Haxall and the Haxall child continued to live together until a time at least subsequent to the filing of the paternity complaint against Petitioner in Dauphin County.

1. *Initial Proceedings*

Petitioner filed an Answer to the paternity complaint along with New Matter denying paternity and demanding a jury trial. Petitioner also filed a Praecipe and Writ to join Mr. Haxall as additional defendant. On July 23, 1990, the Dauphin County Domestic Relations Court denied Petitioner's "Motion to Join Additional Defendant." Both Petitioner's Answer to the complaint with New Matter and Request for Reconsideration of denial of the additional defendant Writ alleged that Petitioner was not the father of the child. Furthermore, the Answer asserted that Respondent was estopped from naming another as a father of the child after she and Mr. Haxall had created at family relationship ("estoppel") with the child. The Answer and New Matter and the Request For Reconsideration were endorsed with notices to plead. Both were served on Respondent and on her attorney.

On December 11, 1990, the Dauphin County Court ordered the case transferred to Cumberland County where Respondent had moved. On December 27, 1990, Peti-

tioner filed a Motion for Judgment in favor of Petitioner and against Respondent in both Dauphin and Cumberland Counties, on the basis of the unanswered allegations of Petitioner's Answer and Request.

2. ***Appointment of Special Counsel***

In November 1990, Matthew Gover ("Mr. Gover") was hired as a Dauphin County Domestic Relations Section Special Counsel to represent welfare recipients in collecting support.

Domestic Relations of Dauphin County is a Section of the Domestic Relations Court of Dauphin County. The Domestic Relations Section is budgeted through the County. Title IV, 42 U.S.C. § 601 *et seq.* (1988), particularly § 603(a), provides for reimbursement to the Domestic Relations Section for aid paid to families with dependent children. Section 603(h) provides that reimbursement is reduced if Domestic Relations fails to operate a complying part D program. Part D, 42 U.S.C. § 651 *et seq.* (1988), relates to child support establishment of paternity. Section 652(g)(1) mandates that a program shall be found not to have complied unless its paternity establishment percentage is 75% or greater.

The Special Counsel is an employee of the Domestic Relations Section. He is hired to act as a prosecutor to enforce support orders on behalf of welfare clients of the Domestic Relations Section and to preserve Title IV reimbursement funding. The Special Counsel holds himself out as representing the Domestic Relations Court Section and is considered by litigants, opposing counsel, the County testing laboratory, by the Domestic Relations Section and the Domestic Relations Court as a prosecutor who represents the Domestic Relations Section of the Court.

Respondent has been a welfare client of the Domestic Relations Section since immediately after she became pregnant. Sometime after his hiring to represent welfare clients in support enforcement, Mr. Gover also undertook representation of Respondent in her paternity case against Petitioner. A Domestic Relations Special Counsel represented Respondent through all subsequ nt paternity proceedings including appeals in this matter.

3. *Proceedings Relating to Reversal of the August 1992 Paternity Order*

On March 19, 1991, Special Counsel filed a Reply to Petitioner's Answer to New Matter. He then scheduled blood tests for July 7, 1992. Special Counsel continued the scheduled tests but on July 21, 1992, he filed a Petition for Bench Warrant and/or Security against the Petitioner based on an alleged failure to appear for the tests. A hearing was scheduled on the Petition in Domestic Relations Court for August 17, 1992. Petitioner advised the Court that he no longer resided in Pennsylvania and that his counsel was unavailable on that date. Petitioner requested a continuance. The Court did not respond but proceeded with the hearing as scheduled. At the hearing, the Court decided not to issue a bench warrant or require security but instead entered a paternity Order against Petitioner for his failure to appear. On September 11, 1992, the Domestic Relations Court issued a support Order. Petitioner appealed the Orders to the Pennsylvania Superior Court alleging violations of due process. On September 30, 1993, the Superior Court reversed and vacated the support Order. Petitioner appealed and on February 15, 1995, the Pennsylvania Supreme Court reversed and vacated the paternity Order. The decision of the Supreme Court found that the paternity Order had been entered in violation of Petitioner's right to due process. The Supreme Court remanded the case to

Dauphin County for further proceedings. *See Freedman v. McCandless*, 654 A.2d 529 (Pa. 1995).

4. *Proceedings on Remand*

On remand, the Dauphin County Domestic Relations Special Counsel filed a Petition for blood tests. Petitioner objected on the grounds that the case had been transferred to Cumberland County by previous Orders of both the Dauphin County Court and the Cumberland County Court. Petitioner also objected on the grounds, that the Special Counsel of the Domestic Relations Section of the Dauphin County Court continued to represent Respondent. The Dauphin County Domestic Relations Court granted Special Counsel's Petition and ordered blood tests, which were conducted on June 13, 1995 by Baltimore Rh Typing Laboratory ("Baltimore"). Baltimore was under contract with Dauphin County to regularly conduct blood tests in disputed paternity cases. The Domestic Relations practice was to order RDC and HLA testing. In this case, Special Counsel petitioned for and obtained a blood test order directing HLA and DNA testing. The HLA and DNA test results showed genetic fragments of the child that could not be attributed to either the mother or to Petitioner and that excluded Petitioner from paternity. The Appendix Figures (App. 42a) are the relevant sections of two of the photocopies provided by Baltimore of radioautographs from the DNA genetic tests. Figure 1 shows the relevant portion of a radioautograph identified as D7 at trial. In this Figure and in the following Figure 2 (App. 42a), identifying number 904*1*.95 designates a horizontal lane of the mother's fragments. 904*3*.95 designates a horizontal lane of the child's fragments. 904*2*.95 designates a horizontal lane of Petitioner's fragments. The following analysis refers by "location" numbers to fragments on a lane by sequential numbering from left to right (horizontally).

Analysis of the genetic test results illustrated in the Figures is based on Mendelian laws of inheritance that a child inherits genetic fragments from the child's biological parents. If a child possesses genetic evidence that cannot be attributed to either the known mother or to an alleged father, the evidence must be inherited from another. Under such circumstances, a tested alleged father is excluded as the biological parent. The last location (location 6) on the child's lane on Figure 1 shows a genetic fragment (arrow) that is not matched by the mother (the tester has placed an "x" in the mother's lane at this location) or by Petitioner. The child's genetic fragment must come from another, i.e., the biological father. Location 1 of the mother's lane shows a fragment in the vicinity of location 1 of Petitioner's lane. The child shows no matching genetic fragment in this vicinity (arrow). The child inherited an absence of a fragment at this vicinity from another, i.e., the biological father. The results shown in the radioautograph of Figure 1 conclusively exclude Petitioner.

In Figure 2, the radioautograph shows that the child has at least two fragments (locations 3 and 4 designated by arrows) at this *loci* that must originate from a party other than the mother or alleged father. The Figure 2 results conclusively exclude the Petitioner.

The above two radioautographs are from the Baltimore tests and are representative of all the Baltimore test results. All other radioautographs and HLA test results from the Baltimore tests showed evidence that excluded the Petitioner as a father of the Haxall child.

Special Counsel obtained a report from Baltimore conjecturing a paternity probability on an assumption that ignored these exclusions. The Baltimore report stated a probability of paternity of 99.99%.

On August 10, 1995, the Domestic Relations Court issued a schedule that ordered Baltimore to provide discovery of "all" its records by October 15, 1995 and Petitioner to provide his expert's report by November 15, 1995. Petitioner provided a report on October 6, 1996 based on the information that Baltimore had provided to that date. Petitioner sought additional information from Special Counsel and Baltimore relating to radioautographs, error analysis, probability computation, test assumptions and database and other information relating to the test protocol. Special Counsel and Baltimore refused to provide the information. On November 15, 1995, Petitioner filed a Motion to Expand Time to permit Special Counsel time to provide the information. The Domestic Relations Court denied the Motion. On December 29, 1995, Petitioner filed a Second Motion for Rule 4019 Sanctions for failure of Baltimore to provide all information, a Motion to Exclude Respondent's expert opinion evidence, a Motion to Dismiss and a Motion for Oral Argument. On January 12, 1996, the Dauphin County Domestic Relations Court denied Petitioner's sanction motion without argument. The Court directed that Petitioner's Motion to Dismiss and Motion to exclude respondent's expert evidence was to be considered at the time of trial.

Special Counsel moved for trial, which was held April 30 to May 2, 1996. Prior to trial on April 16, 1996, the Special Counsel filed a Motion to exclude Petitioner's expert testimony on the Baltimore test results from trial purportedly on the grounds that Petitioner had failed to accord with the Court's ordered discovery schedule. The Domestic Relations Court denied Petitioner's Motion to exclude the Baltimore expert but granted Special Counsel's Motion to exclude Petitioner's expert. At the conclusion of presentation of evidence at trial, the Domestic Relations Court directed a verdict on conception based

on the Baltimore opinion. The Court further directed that the sole issue to be considered by the jury was whether Petitioner had access to the Respondent during the relevant period of conception. The Court also instructed that the Baltimore 99.99% opinion could be considered on the issue of access. The jury found for Respondent on this issue.

Post Trial Motions were timely filed by Petitioner and were denied by the Court. On February 5, 1998, the Dauphin County Domestic Relations Court issued a Child Support Opinion and Order directing Petitioner to pay $370 per week in respect of an alleged $62,000 arrearage and for support of the Haxall child. On February 19, 1998, Petitioner appealed to the Pennsylvania Superior Court seeking reversal of the paternity finding, reversal of the support Order and dismissal of the complaint. The Pennsylvania Superior Court adopted the decision of the Domestic Relations Court as the Superior Court's opinion on appeal. The Pennsylvania Supreme Court denied Petitioner's Petitioner for Allowance of Appeal.

5. ***Arguments Below—An Irrebutable Presumption of Paternity Based on Unreliable and Subjective Scientific Opinion Evidence Violates Due Process of Law***

In his post trial motion, on appeal to the Pennsylvania Superior Court and in his Writ for Allowance of Appeal to the Pennsylvania Supreme Court, the Petitioner argued that the directed verdict and subsequent binding jury instruction based on the Baltimore opinion violated due process of law. Petitioner argued that the Baltimore opinion should not have been admitted, let alone have determined the outcome of this case. Petitioner argued that the Baltimore opinion was not reliable as follows:

(1) Both HLA testing and genetic DNA test results excluded Petitioner. The Baltimore opinion was

merely an arbitrary number calculated by Baltimore on an assumption that there was no exclusion.

(2) The Baltimore opinion was not based on accepted scientific methodology in that; (a) the opinion mathematically combined probabilities from both DNA tests and HLA testing that may have reflected the exact same genetic loci; (b) the opinion was based on an assumption that the mother had only a single act of intercourse during the conception period, i.e. that Petitioner had equal access with an assumed random man; (c) the opinion used an incorrect and non representative data base of the population character of the area of the tested parties that altered the paternity index by 50-80%; (d) the Baltimore opinion was a single number that ignored error analysis; (e) Baltimore used unknown and perhaps incorrect algorithms to calculate the paternity index and (f) Baltimore ignored fundamental scientific methodology in failing to conduct repeat testing where (i) split alleles are known to give false matches in DNA testing and where (ii) results in the same lab are commonly not reproducible from day to day. *See* J. S. Mayersak, *DNA Fingerprinting Problems for Resolution*, 36 MED. TRIAL TECH. Q., No. 36 (1990) at 441-449; J. S. Mayersak, *DNA Fingerprinting: A Discussion of the Various Sources of Error in the Current System*, 41 MED. TRIAL TECH. Q., No. 1 (1994) at 34-44; Pamela L. Reading and Emily G. Reisner, *The Effect of Difference in Gene Frequency on Probability of Paternity*, 30 J. FORENSIC SCI. (Oct. 1995) at 1130; John R. Taylor, AN INTRODUCTION TO ERROR ANALYSIS, THE STUDY OF UNCERTAINTIES IN PHYSICAL MEASUREMENTS, 3 (2d ed. 1997).

(3) The Domestic Relations Court erred in instructing the jury that the Baltimore opinion established

access. *See Olsen v. Dietz*, 500 A.2d 125, 129 (Pa. 1985).

Special Counsel argued that the Baltimore opinion itself without consideration of underlying facts was sufficient to determine paternity. Special Counsel did not address the question of whether the irrebuttable presumption of the Genetic Statute meets due process standards.

The Domestic Relations Court Opinion in this case stated that the Petitioner failed to preserve this issue because he failed to give requisite notice to the Attorney General. The Superior Court Judgment affirmed the trial court's order and adopted the Domestic Relations Court Opinion. The Record contradicts the statement of the Domestic Relations Court Opinion. The Appendix includes Petitioner's December 29, 1995 Brief that extensively argued both the due process constitutionality of both the Genetic Test Statute and the participation by Domestic Relations Special Counsel and attorney for Respondent (App. 43a-62a). Petitioner also raised these issues in his December 29, 1995 Motion to Dismiss and March 25, 1996 Motion for Reconsideration and to Exclude Evidence (App. 41a). The Appendix also includes docket entries showing filing of Petitioner's Pennsylvania Rule of Civil Procedure 235 Notice (App. 41a) and copies of the Notice and Proof of Notice that was filed with the Dauphin County Court on January 5, 1996 (App. 35a-40a).

6. ***Arguments Below—Intercession by a Section of a Court on Behalf of a Complainant in a Paternity Litigation Before the Same Court Violates a Defendant's Due Process of Law***

Special Counsel for the Domestic Relations Section of the Court represented the Respondent in these proceedings. Special Counsel is an employee of the Court Domestic Relations Section. His appointed function is

to enforce support orders of the Domestic Relations Court to qualify the Domestic Relations Section for reimbursement under Title IV (42 U.S.C. 601 et seq.) of the Social Security Act. In this capacity, Special Counsel enlists the cooperation of the Domestic Relations Court Section and uses access to both the Domestic Relations Court and to its Section to effect an outcome in favor of its client. In the day to day functioning, the Special Counsel calls cases on behalf of the Domestic Relations Section before the Domestic Relations Judge. He has access to, and utilizes, the Domestic Relations Section file to try cases. He directs support enforcement activities of the Domestic Relations Section and is often referred to as a prosecutor. He schedules hearings and develops procedural strategy with the Domestic Relations Section of the Court. He confers on an *ex parte* basis with the Domestic Relations Section and with the Court to obtain orders that may include threats of arrest or other summary enforcement remedies that are used in the enforcement of a support obligation. Special Counsel controls the County testing laboratory, determines and schedules the tests to be administered and controls the file of the laboratory to be turned over in discovery.

In the Pennsylvania proceedings, Petitioner argued that representation of a complainant by Special Counsel and interjection of the interests of a Domestic Relations Section into a paternity proceeding before the Domestic Relations Judge violated a defendant's right to access to a fair and unbiased tribunal. Petitioner argued that while the State has an interest in determining the amount of support and enforcing the support obligation, that interest is different and should not be confused with the State's interest in a fair and unbiased paternity proceeding. A paternity case often involves unrelated parties. A paternity action is a civil action to determine whether a legal relationship should be established. A paternity action

relates to a proposed alteration in the status existing among parties and invokes substantial individual rights that transcend interests of the State.

Petitioner raised the issue of intercession by the Domestic Relations Section into this case through representation of Respondent by the Section's Special Counsel prior to the first state appeal. The issue was not determined by the Domestic Relations Court. The issue is the basis of the Pennsylvania Supreme Court's recognition in its first opinion that Petitioner's claim of commingling was not yet considered. *See Freedman v. McCandless*, 654 A.2d 529, 535 n.12 (Pa. 1995). On remand, the Dauphin County Domestic Relations Court ignored the commingling issue. Petitioner filed: an Answer To Plaintiff's Petition For Blood Tests; a Motion to Disqualify The Domestic Relations Judge; a Motion To Dismiss; Defendant's Motion To Disqualify Plaintiff's Counsel; Motion For Order To Cease Communications to prohibit Special Counsel from direct communications with the Court; Motion To Transfer this case outside Dauphin County; Motion To Exclude Evidence; and Motion For Contempt. Each Motion raised issues of commingling and/or bias. Petitioner filed a Motion For Oral Argument Under Rule 211 of The Pennsylvania Rules of Civil Procedure for argument on the Motion To Exclude Evidence, an Application For Disqualification Of Judge and a Defendant's Motion To Dismiss. Petitioner filed briefs in support of his filings. Special Counsel did not respond to any of the filings. The Domestic Relations Court either ignored or denied Petitioner's filings.

The trial court's December 6, 1996 Opinion (adopted by the Pennsylvania Superior Court's Judgment) on Petitioner's post trial motions states that "[a] hearing were [sic] held on this issue on February 16, 1994" (App. 28a). The Opinion concluded that "[t]here was no commingling of adjudicative and adversarial functions by Mr.

Gover during the relevant time period. Therefore, there is no basis for this allegation of error" (App. 28a-29a). The Opinion also concluded that "Mr. Porter never represented the Dauphin County Domestic Relations Office and has only been employed to represent plaintiffs in paternity matters" (App. 29a). Petitioner responded that the February 16, 1994 hearing had nothing to do with the issue of the relationship between Special Counsel and the Domestic Relations Section of the Court and did not conclude anything about intercession by the Domestic Relations Section and its Special Counsel. The February 14, 1994 hearing was at the insistance of the Domestic Relations Section Solicitor. The hearing was held over Petitioner's objection while this case was on first appeal to the Pennsylvania Supreme Court. The hearing was scheduled to enter a support order. No hearing was ever held on the bias and commingling issue and no findings or conclusions were made by the lower court that were relevant to this issue. The state courts did not respond to the Petitioner's arguments.

REASONS FOR ALLOWANCE OF THE WRIT

The Pennsylvania state courts sustained validity of the conclusive presumption and procedure of the state Genetic Test Statute against Petitioner's due process objections and approved the procedure of participation by a court's domestic relations section on behalf of a welfare paternity complainant. The Pennsylvania Courts have rendered an erroneous decision on substantial questions of the relationship between the State and the individual that will have far reaching implications on procedural due process. These issues were properly raised in the state court proceedings. This Court should grant this Writ of Ceritorari to consider correcting the Pennsylvania Courts' errors in refusing to consider these issues of constitutional importance.

I. THE PENNSYLVANIA COURT OF LAST RESORT HAS DECIDED IMPORTANT DUE PROCESS OF LAW QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The issues raised by Petitioner are whether a conclusive presumption of paternity based on unreliable and subjective scientific opinion evidence and intercession by a section of a court on behalf of a welfare complainant in a paternity litigation violate a defendant's due process of law. The decisions of the Pennsylvania courts on these issues squarely conflict with this Court's procedural due process of law decisions.

A. The Conclusive Presumption of the Pennsylvania Genetic Test Statute Violates Due Process of Law Under the Fourteenth Amendment to the United States Constitution

The Pennsylvania Genetic Test Statute provides that "results indicating a 99% or greater probability" of paternity create a presumption of paternity, "which may be rebutted only by clear and convincing evidence that the results of the genetic tests are not reliable in that particular case." The presumption of paternity is conclusive and irrebutable against evidence relating to the science of genetic testing. The presumption can be challenged only by clear and convincing evidence of particular case unreliability. While the Statute provides for rebutting the presumption with clear and convincing "particular case" evidence, the trial Court interpreted the Baltimore opinion as conclusive against all evidence. The Court prohibited Petitioner from submitting direct evidence of exclusion that contradicted the Baltimore opinion and directed a verdict on the basis of the opinion in the face of Petitioner's substantial particular case unreliability evidence that was developed by cross examination. The Court gave a binding instruction on access by permitting

the jury to consider the Baltimore opinion on this question. In effect, the Court found the Baltimore opinion conclusive against all other evidence.

This Court has held in regard to presumptions that due process requires some rational connection between the fact proved and the ultimate fact presumed. The due process standard for a presumption is whether the inference of one fact from proof of another is not so unreasonable as to be a purely arbitrary mandate. *See McFarland v. American Sugar Refinery Co.*, 241 U.S. 899, 904 (1916).

In the context of the present case, the question is whether there is a rational connection between a paternity opinion of a genetic testing laboratory (the fact proved) and irrebutable paternity (the fact presumed). Since substantial constitutional rights are implicated in the resolution of questions of paternity and since an adjudication of paternity may result in the future loss of property and physical liberty, the connection between the proved fact and ultimate fact of the Statute should be carefully scrutinized against the due process standard.

Paternity testing is not the same as genetic testing in the identity field. The scientific premise for paternity genetic testing is contradictory to the premise of identity genetic testing. The premise for identity genetic testing is that every person's genetic constitution is unique from that of every other person includng brothers, fathers, uncles, cousins, etc.). The premise for paternity genetic testing is that identical genetic information is shared between a child and parents. Both paternal and maternal families of Petitioner are large and have resided in the central Pennsylvania area for centuries. Persons in the central Pensylvania area that share genetic material with the alleged father may number in the millions. It is more

probable than not, that partners of the mother share some of the same genetic material. The extent of the sharing is unknown. However, clearly this invalidates probabilities based on the paternity test calculations on the basis of data from areas outside of the area of the tested parties' domicile.

A genetic tester examines a radioautograph, which is a transparent photographic negative that displays patterns of genetic fragments, sorted in order of size. The first assumption of the test is that all fragments of the same size will sort to the same position. The tester examines the positioning of the fragments and declares whether matches are present between a location of the mother and child or between the purported father and child. It is solely the subjective determination of the tester as to whether fragments line up sufficiently to declare a match or whether evidence of a fragment is discernable at a particular loaction. At trial, cross examination of the Baltimore witness developed an issue as to whether an original radioautograph corresponding to the copy in the Appendix 42a, Figure 1, displayed a fragment at the mother's location 6. The Baltimore witness argued that he saw a fragment there. Petitioner argued that no such fragment could be seen and published the radioautograph to the jury for its close scrutiny. The Domestic Relations Court directed verdict prevented the jury from resolving this factual question.

The testers make subjective assessments of the degree of error to be assigned to test results and decisions as to whether to include some tests in the calculation of the index and not others, the number of partners to be assumed to calculate probability and the types of tests to be conducted for calculating the probability. Add to this that split alleles are known to give false matches in DNA testing and that results in the same lab are commonly

not reproducible from day to day. *See* Mayersak, *supra.* The test is both subjective and unreliable. Hence, reliable scientific authorities outside of the laboratory testing community accept paternity testing only for exclusion purposes. *See* D. H. Kaye, *DNA Paternity Probabilities,* 24 MED. TRIAL TECH. Q., No. 3 (1990) at 301-304.

Particular case paternity testing is unregulated and uncontrolled. The Pennsylvania Statute places no guides, restrictions or limitations on the testing. A tester can make assumptions that determine exclusion versus non-exclusion. In the present case, Petitioner denied that he engaged in sexual relations with the child's mother. Petitioner argued that same tests that Baltimore conducted and concluded established a 99% probability of paternity, in fact exclude Petitioner. Every radioautograph in this case shows evidence of exclusion of the Petitioner. However, the Pennsylvania Statute does not require an expert to conclude exclusion. Baltimore constructed an opinion on subjective assumptions that ignored exclusion evidence and made other inclusionary assumptions. Those assumptions included: (1) combining different tests to inflate a probability even though the tests may very well reflect the same genetic *loci*; (2) ignoring the mathematical effect of multiple partners; (3) calculating the probability against a non representative data base of the population character of the area of the tested parties; (4) ignoring error analysis; and (5) using incorrect algorithms to calculate the paternity index.

The testers are not impartial. The state has enormous incentives to determine paternity in the form of "bounty" paid to state agencies that achieve prescribed percentages of paternity establishment. *See* the Social Security Act, 42 U.S.C.A. § 652(g) (1988). The testers are retained by the state to conduct the testing. Constructing a probability of greater than 99% is easy to do when exclusion

is ignored and other test assumptions are made. The tester simply runs as many tests as needed for the 99% probability and multiples the test probabilities together.

Conclusive presumptions substantially raise the bar of the preponderance of evidence burden of proof. The Pennsylvania Genetic Test Statute burden of proof was considered by this Court in *Minnich v. Rivera,* 483 U.S. 574 (1987). In *Minnaich,* this Court commented that a paternity litigation substantially involves private persons with private interests. This observation does not apply to a paternity litigation involving a welfare client. As in the present case, the State has a substantial interest and participates in the litigation with the end in mind to protect that interest. The State exercises its exceptional power to effect a favorable result against a defendant. The result can mean a substantial loss of property to the defendant. More importantly, the result can mean incarceration of the defendant. A substantial support arrearage can build up during a paternity litigation and the inability of a defendant to promptly pay that arrearage, not uncommonly results in the defendant's incarceration.

The *Minnich* rationale of a preponderance of the evidence burden is not relevant in a welfare establishment proceeding. Furthermore, the added conclusive and irrebutable presumption of the Genetic Test Statute raises the burden of proof bar to an insurmountable level. The paternity presumption created by the Baltimore opinion has no relation in experience or in science to a fact of paternity.

The Pennsylvania Genetic Test Statute conflicts with the testing statutes of the various states of the United States. For example, a Massachusetts statute provides for a rebuttable presumption without specifying the evidence to overcome the presumption. MASS. ANN. LAWS ch.

209C § 17 (West 1998). A Minnesota statute provides for a presumption rebutted by clear and convincing evidence. MINN. STAT. ANN. § 257.62 (West 1987). No state provides for an irrebutable presumption.

The decision of the Pennsylvania courts on the Statute conflict with the reasoning of *Minnich* and with *McFarland v. American Sugar Refinery Co.* The Pennsylvania decisions conflict with this Court's holding that due process invalidates a presumption that is conclusive, without regard to actualities. *See Schlesinger v. Wisconsin,* 270 U.S. 230 (1924); *Heiner v. Donnan,* 285 U.S. 312 (1932). The decisions conflict with at least the Federal Circuit Court of Appeals, which has required a rational nexus between proven facts and presumed facts. *See United Artists 829, Brotherhood of Painters and Allied Trades, AFL-CIO v. NLRB,* 762 F.2d 1027 (Fed. Cir. 1985).

The Writ of Certiorari should be granted.

B. Intercession by a Section of a Court on Behalf of a Complainant in a Paternity Litigation Before the Court Violates Due Process of Law

In 1990, the Domestic Relations Court Section hired a Special Counsel to represent walfare clients in collecting child support. The Section also permitted or appointed Special Counsel to represent the Respondent in this paternity proceeding.

A paternity action is not the same as a support action and the State's interests are substantially different in a paternity action from those in a support action where paternity and its consequential obligation have already been established. The creation of a parent-child relationship involves substantial and protectable familial interests. "The nature of paternity proceedings . . . also bears heavily

on appellant's due process claim. Although the state characterizes such proceedings as civil, they have 'quasi-criminal' overtones." *Little v. Streater,* 452 U.S. 1, 10 (1981) (citations omitted). Due process encompasses elements of equality and requires that a defendant be treated with "fundamental fairness." *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973). The participation of a section of a court on behalf of a complainant in a paternity litigation before the same court is fundamentally unfair and conflicts with this Court's decisions on due process of law.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of factual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome. . . ." (citation omitted). *In re Murchison,* 449 U.S. 133, 136 (1955). [A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150 (1968).

Petitioner cannot argue with assurance that the Domestic Relations Section effected an influence over the Domestic Relations Court. However, the record clearly evidences the apearance of an influence and a censequential appearance of bias. On remarnd, the Domestic Relations Court first ordered discovery. However, both Special Counsel and the Solicitor resisted discovery of information on the test conducted by Baltimore and information in the Domestic Relations files concerning the bringing of the paternity action against Petitioner. Petitioner complained but the Domestic Relations Court refused to enforce its orders. Instead on motion of Special

Counsel, the Court precluded the Petitioner from presenting his expert witness evidence of exclusion and directed a verdict against the Petitioner to prevent consideration by the jury of exclusion evidence developed through cross examination.

The Dauphin County Court in December 1990, transferred this case to Cumberland County where the Respondent had moved. Nonetheless, the Dauphin County Court proceeded on the motion of Respondent and over the objection of Petitioner immediately after the Court's Special Counsel was appointed as the Respondent's attorney. Petitioner was a resident of Virginia and had been for seven years when the Dauphin County Court directed its verdict and entered the paternity judgment and support order in this case. Both Petitioner and Respondent are currently residents of Virginia. Dauphin County has no current jurisdictional interest in this case. Its interest is to maintain its Title IV establishment reimbursement.

The relationships of Solicitor and Special Counsel to the Domestic Relations Court, the efforts by the Solicitor and Special Counsel to prevent full and fair litigation of the paternity issue and the Court's adoption of the positions of Solicitor and Special Counsel and the motivation of the Domestic Relations Section to meet its establishment quota create an appearance of commingling and bias.

The Daughin County Domestic Relations Court is charged with decision-making functions that should avoid the appearance of prejudice, regardless whether it arises from its members or from those who represent litigants before the Court. Domestic Relations is a branch of the Domestic Relations Court. Therefore it should be held to the standards of integrity expected from a judicial entity. These standards are higher than those expected from other governmental bodies. A bias and a commingling appears in this case that denied Petitioner access to

a fair and unbiased tribunal and violated 14th Amendment rights to a fair adjudication by due process of law.

The decisions of the Pennsylvania courts in this case present a threat to public confidence in the courts. This Court has said that "every procedure which would offer a possible temptation . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The Pennsylvania court decisions conflict at least with the reasoning of *Tumey*, *Commonwealth Coatings Corp. v. Continental Casualty Co.* and *In re Murchison, supra.*

II. THE PENNSYLVANIA COURT OF LAST RESORT HAS DECIDED IMPORTANT DUE PROCESS OF LAW QUESTIONS WHICH WILL HAVE FAR REACHING SOCIAL CONSEQUENCES IF PERMITTED TO STAND

If permitted to stand, the conclusions of the Pennsylvania courts will have far reaching implications.

First, this case is followed closely by domestic relations offices and if allowed to stand, the offices will reorganize as part of the Court that adjudicates paternity questions. These offices will adopt summary procedures to establish paternity to complement summary support enforcement proceedings. Determinations of the support obligation will be made without regard to scientific exclusion and without regard to actual paternity. The procedure will generate disrespect for government and particularly for the courts and will generate litigation.

If permitted to stand, this case will diminish public confidence in the integrity of the courts. Failure to grant this writ will leave unanswered the role of a judge in deciding a paternity action where a litigant to the action is represented by the special counsel of the same court's

section while the court section is actively interceding in the action on behalf of the litigant to obtain a decision that will support the section's qualification for funding. All of these factors are exacerbated by the court's circumvention of the jury by its directed verdict decision and charge in this case. Incarceration of men for failure to meet the expectations of court orders is not uncommon. Incarceration after a decision that appears bias motivated generates resentment and disrespect and undermines the integrity of the court system.

Granting this Writ of Certiorari will permit this Court to review substantial issues relating to the role of scientific evidence in litigation and to the procedural due process rights of individuals in "quasi-criminal" actions. Granting this Writ will resolve substantial issues of public interest.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM C. COSTOPOULOS
COSTOPOULOS, FOSTER & FIELDS
831 Market Street
P.O. Box 222
Lemoyne, Pennsylvania 17043
(717) 761-2121

APPENDIX

APPENDIX

[Filed Oct. 14, 1998]

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 291 Harrisburg 1998

MARGARITE J. MCCANDLESS,
Appellee

vs.

PHILLIP FREEDMAN,
Appellant

Appeal from the Order entered February 9, 1998
in the Court of Common Pleas, Family Division,
Dauphin County, at No. 447 DR 90

BEFORE: JOYCE, HESTER, JJ. and CIRILLO, P.J.E.

Phillip Freedman appeals *pro se* from a support order entered in the Court of Common Pleas of Dauphin County. We affirm.

The parties to this case are not new to this court. As the trial court has stated, "[t]his case has a long and tortured history." Freedman, a practicing attorney since 1966, has been challenging his paternity and support obligation in the courts of this Commonwealth for nearly a decade.

On January 24, 1990, appellee, Margarite McCandless (Mother) filed a complaint for child support against

Freedman. Following a jury trial on May 2, 1996, Freedman was determined to be the father of the child in question. Freedman's paternity has been determined by blood and genetic (HLA) testing, which established the probability of his paternity at 99.99%. A conference before a support hearing officer was scheduled for January 21, 1997. Freedman failed to appear. Mother appeared, with her attorney, and offered her income and expense statement, her public assistance records, and her records indicating her part-time student status. The only information regarding Freedman's income was deposition testimony offered by Mother's attorney, which indicated that Fredman earned $75,000.00 per year.

Following the support conference, the hearing officer recommended a support order of $147.00 per week, plus weekly payments toward arrearages and blood testing. The trial court adopted that recommendation and Freedman timely filed a *de novo* appeal in the court of common pleas. *See Warner v. Pollock,* 434 Pa. Super. 551, 644 A.2d 747 (1994) (Rule 1910.11(f) provides for the right of a party to demand a *de novo* hearing). The hearing was not scheduled within sixty days, *see* Pa.R.C.P. 1910.11(i), and Freedman filed an appeal to this court. In a per curiam opinion filed on September 11, 1997, this court quashed Freedman's appeal. We stated there that the trial court's failure to act in a timely manner did not render the temporary support order final. *McCandless v. Freedman,* 700 A.2d 546, 547-48 (Pa. Super. 1997), *citing Sanders v. Sanders,* 384 Pa. *Super.* 311, 558 A.2d 556 (1989). We remanded the case to the trial court and directed the court hold a support hearing within thirty days. *McCandless,* 700 A.2d at 548.

Prior to this court's September 11, 1997 decision, however, the trial court had directed Freedman to appear

to provide financial information; Freedman failed to appear. Thereafter, the court scheduled a support hearing for July 24, 1997; again, Freedman did not appear. On September 8, 1997, three days prior to this court's decision, the trial court entered three orders—the first directed Freedman to provide financial information; the second scheduled a contempt hearing for September 18, 1997 as a result of Freedman's failure to appear on July 9, 1997 and July 24, 1997; and the third directed Freedman to appear for a *de novo* support hearing on October 2, 1997. Freedman did not comply with any of these directives. Thereafter, in accordance with this court's September 11, 1997 decision, the court scheduled a *de novo* support hearing for October 21, 1997. Once again, Freedman failed to appear.

The trial court conducted the support hearing in Freedman's absence. The court reviewed the Domestic Relations file, which included Mother's income and expense statements and her wage information pertaining to her temporary employment with the U.S. Geological Associates. Based upon this information, the court assigned Mother an earning capacity of approximately $1,000.00 per month, effective from the date of the filing of the support complaint. The court assigned Freedman an earning capacity of $4,745.00 per month based upon Freedman's October 6, 1995 deposition testimony.[1] After

---

[1] Following is Freedman's deposition testimony:

Q: Where are you working now?
A: With a law firm in Alexandria.
Q: What is the name of that?
A: Olliff and Berridge.
Q: What is your position there?
A: Attorney.
Q: And what is your salary?
A: I make about 75,000 a year.

[Continued]

applying the support guidelines, the court entered a support order in the amount of $147.00 per week, plus $60.00 per week for arrearages and $20.00 per week on HLA/DNA blood groupings.

Freedman raised thirty-four claims in post-trial motions and supplemental post-trial motions, all of which were denied. This appeal followed. Freedman now raises eleven claims for our review: [2]

---

[1] [Continued]

Q: When you say about 75,000, what do you mean?
A: I sometimes get bonuses.
Q: How often are you given bonuses?
A: Once a year.
Q: What was your bonus last year?
A: I wasn't making 75 last year but my bonus last year was about 3,000.

[2] Appellant's brief violates Pennsylvania Rule of Appellate Procedure 2116(a). The rule provides in relevant part:

> The statement of the questions involved . . . should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without any other matter appearing thereon.

Pa.R.A.P. 2116(a). Freedman's statement of questions presented exceeds 15 lines. Thus it is within this court's power to dismiss the appeal based on an appellant's failure to conform with the requirements of the rules of court. *See* Pa.R.A.P. 2101. We refer the appellant to the insights of the Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit:

> When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.

United States v. Hart, 693 F. 2d 286, 287 n.1 (3d Cir. 1982) (quoting Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility—A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap.U.L.Rev. 445, 458 (1982)). *See also Hughes v. GAF Corp.*, 364 Pa. Super. 311, 521 A.2d 1973 (1987).

1. May a court proceed after transferring a paternity case to another county?

2. Must a court vacate a paternity finding against a defendant who is excluded by genetic test results?

3. Is it error to exclude expert testimony as a discovery sanction without consideration of applicable legal standards?

4. Is it error to admit an uncertified laboratory opinion that is based on combined HLA and genetic tests, ignores exclusion and uses unaccepted scientific methodology?

5. Is it error to direct a verdict on the basis of the same opinion?

6. Is it error to admit a doctor's opinion as a business record and to preclude evidence of family relationship (estoppel)?

7. Is it error to mischaracterize critical evidence in jury instructions?

8. Is it error to enter a support order without evidence?

9. Is a genetic test statute unconstitutional that provides for an irrebuttable presumption of paternity based on subjectively determined unreliable test results?

10. Is a defendant in a paternity case tried before the Domestic Relations Court, denied a constitutional right to an independent and impartial tribunal where plaintiff is represented by the Domestic Relations Court Section Special Counsel and where the current Solicitor to the Domestic Relations Section of the Court previously represented plaintiff in the case?

11. Does a court err in refusing to dismiss a paternity complaint where plaintiff is represented by the Domestic Relations Court Section Special Counsel and was represented by the Solicitor, where the Court did not have jurisdiction, where genetic tests exclude the defendant and where the plaintiff admitted family relationship (estoppel)?

After reviewing the parties' briefs, the record, and the relevant case law, we find that the Honorable Todd A. Hoover has thoroughly reviewed the matter and properly disposed of the issues presented in his opinion on post-trial motions.[3] We, therefore, affirm the order based on Judge Hoover's opinion, a copy of which is attached for purposes of allocatur.

Order affirmed.

---

[3] Although the wording of the issues in Freedman's appellate brief differs from that of the claims in his post-trial and supplemental post-trial motions, a careful review of the claims and the arguments presented reveals that the issues brought forth on appeal have been preserved and have been addressed by the court in his decision on post-trial motions.

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. 447 DR 90

CIVIL ACTION—PATERNITY

MARGARITE J. MCCANDLESS,
Plaintiff

vs.

PHILLIP FREEDMAN,
Defendant

OPINION

This matter is presently before the court on the defendant's post-trial motions. Briefs were filed and the relevant facts and procedural history are summarized as follows:

On January 24, 1990, the mother of the child, Margarite J. McCandless, filed a complaint for child support against Philip D. Freedman.[1] On April 23, 1990, Freedman filed a motion to add Thomas Haxall as an additional defendant alleging that Haxall was the father of Grant. This motion was denied on July 23, 1990. A petition for reconsideration was denied and Freedman sought permission from our Superior Court to appeal the denial of his motion to add an additional defendant. This petition

---

[1] Prior to the action against Freedman, McCandless had sued Thomas Haxall for child support as the father of the child. Blood tests were taken by Mr. Haxall, Ms. McCandless and the child, Grant McCandless. The test results excluded Thomas Haxall as the father of Grant and the case against Mr. Haxall was dismissed.

was denied by the Superior Court on January 29, 1991. On August 14, 1990, Freedman filed an answer with new matter which alleged that the child's father was Thomas Haxall. Freedman advanced the issue of estoppel and stated, inter alia, that McCandless and Haxall planned to have a child together, that McCandless had sexual relations during the period of conception, that Haxall and McCandless lived together during the time that McCandless was pregnant and that the child's birth certificate named Haxall as the father. A hearing was held on the issues of estoppel and laches on December 23, 1991 and January 14, 1992. At the conclusion of the hearings, the court determined that McCandless was not estopped from bringing a support action against Freedman and ordered McCandless, Freedman and the child to submit to blood tests. Freedman's motion for reconsideration was denied and an appeal was filed with the Superior Court. Blood testing was scheduled for July 7, 1992 and Mr. Freedman did not appear. On August 17, 1992, the court conducted a contempt hearing, Freedman was not present, and the court found that Freedman was the father of Grant. On September 4, 1992, a support conference was held before a hearing officer and on September 11, 1992, an order of support was entered for $110 per week and $30 on arrearages. Freedman filed a motion to dismiss and a motion for reconsideration which were denied. On September 28, 1992, Freedman requested a de novo support hearing which was denied on October 1, 1992.

The Superior Court quashed Freedman's appeal relating to the blood tests on the grounds that such an appeal was interlocutory. The Superior Court determined that an appeal of an order for blood tests will be permitted only when the parties are married. The Superior Court determined that nevertheless, even if an appeal was permitted, McCandless provided sufficient evidence

to overcome the estoppel argument. The Superior Court remanded the case to this court for a de novo support hearing pursuant to Rule of Civil Procedure 1910.11(i) and for a hearing to determine whether the defendant was denied due process since it was alleged that the attorney for the plaintiff, while he represented the plaintiff in this paternity and support proceeding, held a position as legal advisor to the Dauphin County Domestic Relations Office.

The Supreme Court granted the petition for allowance of appeal on the issue of the appealability of the blood test order and to consider whether the trial court's determination of paternity was conducted in a manner which violated the defendant's right to due process. The Supreme Court determined that in any child support matter in which paternity is denied on the grounds of estoppel, the trial court must conduct a hearing on the issue of estoppel and determine whether the mother is estopped from pursuing her claim against the alleged father. If the trial court decides the issue adversely to the alleged father, the alleged father may appeal the decision even though it is interlocutory and even though the mother has never been married. The Supreme Court concluded that it was error for the Superior Court to have quashed Freedman's appeal from the order requiring blood tests but that the error was harmless. The Supreme Court conducted an independent review of the record of the estoppel hearing and concluded that the Superior Court was correct that Ms. McCandless had provided sufficient evidence to defeat the defense of estoppel. The Supreme Court determined that the Superior Court was correct in determining that it was not error for the trial court to order the parties to submit to blood tests. The Supreme Court determined that the paternity order was improperly

entered and the trial court was directed to conduct a hearing on the issue of whether Freedman refused to submit to blood tests and to proceed thereafter in a manner consistent with the requirements of law.

On May 23, 1995, Philip Freedman, Margarite McCandless and Grant Thomas Haxall [2] were ordered to appear for HLA and DNA blood testing on June 13, 1995. On July 17, 1995, it was determined that Mr. Freedman could not be excluded as the father of Grant Thomas Haxall and the probability of paternity was 99.99%. Numerous requests for discovery were made and on August 10, 1995, the court entered an order directing the obligee and the obligor to appear for depositions and the order stated that these depositions must be completed before October 15, 1995. The court directed the obligor to file a rule to show cause on the Department of Public Welfare to gain access to certain records at the Department of Public Welfare. The court also granted Mr. Freedman's request to review the medical records of Ms. McCandless at the Polyclinic Medical Center. The court further directed that the Obligor's expert discovery was to be completed by October 15, 1995 and that any expert reports were to be completed by November 15, 1995. The court specifically stated that if any expert report was not made available by November 15, 1995, such expert testimony would be inadmissible at trial. The obligee was afforded twenty days from receipt of the obligor's expert report to conduct any further discovery from the obligor's expert. On November 15, 1995, the defendant filed a motion to expand time to complete the expert's report which was denied on De-

---

[2] The child is now known as Grant McCandless. The child's name was changed to Grant McCandless at the request of Thomas Haxall since the blood tests excluded Thomas Haxall as the father. (N.T. 160).

cember 7, 1995. Numerous motions in limine and pretrial motions were filed. Pretrial hearings were conducted and the court granted the plaintiff's motion to exclude the defendant's expert testimony. Trial commenced on April 30, 1996 and on May 2, 1996, the jury found in favor of the plaintiff. Post-trial motions were filed which are now before the court for disposition.

1. The defendant argues that the court erred in granting the plaintiff's motion to exclude the defendant's expert testimony. On August 10, 1995, the court issued an order which granted the defendant's request for discovery but directed that the defendant's expert discovery be completed by October 15, 1995 and that any expert reports were to be completed by November 15, 1995. Defendant's motion to expand time to complete the expert report was denied on December 7, 1995. A hearing on the plaintiff's motion to exclude any expert testimony offered by the defendant at trial was held on April 23, 1996. At the conclusion of this hearing, the plaintiff's pretrial motion was granted.

At this hearing, the defendant testified that he was a practicing attorney and had been acting pro se in 1995. (N.T. 3-4 April 23, 1996). A hearing was scheduled for August 10, 1995 and the defendant testified that on August 8, 1995, he contacted Dr. Mayersak from Wisconsin and Dr. Wecht from Pittsburgh to see if either would consider being an expert witness in his case. (N.T. 5 April 23, 1996). Dr. Mayersak informd Mr. Freedman that he would charge $1000 for a report on the Baltimore RH Typing Laboratory's findings and $5000 for a court appearance. (N.T. 5 April 23, 1996). Following the hearing on August 10, 1995, this court issued an order directing that the Baltimore RH Typing Laboratory provide all information to the defendant to enable

him to have this information reviewed by his own expert witness. (N.T. 6 April 23, 1996). This order, as stated above, provided a schedule that the information be provided to the defendant by October 15, 1995, and that an expert report be provided by the defendant by November 15, 1995. (N.T. 6 April 23, 1996). The defendant testified that he wrote a letter to Dr. Mayersak to inform him of these deadlines. (N.T. 6 April 23, 1996). The defendant testified that he served this order on the Baltimore RH Typing Laboratory on August 28, 1995. (N.T. 7 April 23, 1996). On September 17, 1995, the defendant received a letter from Dr. Mayersak which expressed his concern about the timely receipt of the records from the Baltimore RH Typing Laboratory. (N.T. 9, April 23, 1996). The defendant stated that he received the first records from the Baltimore RH Typing Laboratory on September 23, 1995. (N.T. 10 April 23, 1996). On September 25, 1995, the defendant, by letter, advised the court about the delay in receiving the information from the Baltimore RH Typing Laboratory and requested an extension of time for completion of the discovery. (N.T. 11 April 23, 1996). On September 27, 1995, Dr. Mayersak wrote a letter to the defendant stating that he had a concern about the certification of the Baltimore RH Typing Laboratory. (N.T. 14 April 23, 1996). The defendant wrote a letter to the Baltimore RH Typing Laboratory and requested information about their certification and reiterated the fact that all information had to be forwarded to the defendant by October 15, 1995, the court imposed deadline. (N.T. 14 April 23, 1996). The defendant received additional information from the Baltimore RH Typing Laboratory on October 9, 1995. (N.T. 15 April 23, 1996). These materials were immediately provided to Dr. Mayermsak. (N.T. 15-16 April 23, 1996). Dr. Mayersak informed the defendant that at the

very lease, he needed accurate radioautographs. (N.T. April 23, 1996). On October 20, 1995, the defendant sent to Dr. Mayersak additional records that he received from the Baltimore RH Typing Laboratory and the Polyclinic Hospital records. (N.T. 16 April 23, 1996). On October 25, 1995, the defendant again wrote a letter to the court expressing concern that he had received only partial records from the Baltimore RH Typing Laboratory and requested the court to permit the defendant to expand the time to complete discovery. (N.T. 16 April 23, 1996). The defendant stated that on October 31, November 1 and November 5, 1995, he exchanged correspondence and faxes with Dr. Mayrsak concerning issues involved in the testing and in the expert report. (N.T. 17 April 23, 1996). On November 5, 1995, the defendant wrote to the attorney for the plaintiff and advised him that he was having trouble getting information from the Baltimore RH Typing Laboratory. (N.T. 17 April 23, 1996). Dr. Mayersak told the defendant that he could not render an opinion without the original radioautographs. (N.T. 17 April 23, 1996). The attorney for the plaintiff contacted the defendant and stated that he was obtaining the information requested in the November 5, 1995 letter. (N.T. 19 April 23, 1996). The defendant received a letter from Mr. Porter, the attorney for the plaintiff, which indicated that the defendant could pick up the original radioautographs at his office in Hershey. (N.T. 19 April 23, 1996). This was unsatisfactory to the defendant and he requested Mr. Porter to send the original radioautographs by secured courier to his office in Virginia. (N.T. 20 April 23, 1996). Finally, the defendant agreed to come to Hershey to obtain these records but arrangements were not finalized with Mr. Porter. (N.T. 22-25 April 23, 1996). It was not contradicted that the defendant never filed a

formal motion with the court outlining his discovery problems until the deadline had passed for the preparation of an expert report. (N.T. 75 April 23, 1996). In the motion to expand discovery that was filed on November 15, 1995, the defendant failed to reference any letter that he had written to the court indicating that he had a problem with obtaining the necessary discovery information. (N.T. 75 April 23, 1996).

After listening to arguments from counsel, we concluded that the defendant did not adequately bring to the court's attention any problems with receiving the necessary discovery material from the Baltimore RH Typing Laboratory. The defendant did not include in any motions or letters to the court a report or any type of communication from Dr. Maversak that expressed what he needed and could not obtain from the Baltimore RH Typing Laboratory. At the very least, the defendant, an experienced attorney, should have obtained some type of report or statement from Dr. Mayersak as to why he could not complete his expert report within the deadline provided by the court. The Baltimore RH Typing Laboratory promptly provided the defendant with information above and beyond the court order of August 15, 1995. The defendant did not provide the court with any expert testimony or non-expert testimony why his expert could not be produced by November 15, 1995. The record also reflects that the defendant identified experts before August 15, 1995 that he intended to use in this case. This case was commenced in 1990 and the court set forth a reasonable discovery schedule that set deadlines for completion of expert discovery that imposed reasonable conditions on all parties. The defendant failed to meet the expert discovery deadline and we were constrained to prohibit him from introducing any expert testimony to contradict the findings from the Baltimore

RH Typing Laboratory. We acknowledge that this was a harsh sanction but we exercised our discretion and found it to be appropriate. The defendant was advised by our order dated August 15, 1995, that he had two options; either furnish his expert report by November 15, 1995 or be precluded from presenting any expert testimony at trial. The defendant chose the latter option and is required to accept the consequences of his lack of diligence.

2. The defendant next argues that the court erred in denying his Motion for Severance. The defendant states that he filed a motion to have two jury trials. The first trial would have been on the issues as to whether a parental relationship existed with the plaintiff, Thomas Haxall and the child which gave rise to a duty to support the child and whether the plaintiff and the defendant engaged in the reproductive act during the relevant period of conception. The second proposed jury trial would have been limited to the reliability, validity and interpretation of the blood test results.

This motion was denied on February 14, 1996. The estoppel issue was already decided by the Pennsylvania Supreme Court in *Freedman v. McCandless*, 539 Pa. 584, 654 A.2d 529 (1995). The Supreme Court determined that there was insufficient evidence presented that Mr. Haxall, the plaintiff and the child were a familial unit and that the child considered Mr. Haxall to be his father. The question as to whether the plainitff and the defendant had engaged in the reproductive act at the time in question and the results of the blood testing are the normal issues in a paternity case. There was no authority for the severance of these issues and we properly denied the defendant's request.

3. The defendant contends that this court erred in denying his motion to dismiss. The motion to dismiss stated that the test results excluded the defendant as the father of the child and that the proceedings violated the defendant's right to due process of law.

The defendant filed this motion on December 28, 1995 and the court issued an order on January 12, 1996 which stated that the court would address this motion immediately prior to trial. Hearings on the reliability of the DNA results were held on April 5, April 12 and April 23, 1996. The court determined that the DNA results were reliable and denied the motion to dismiss. The defendant never raised at the pretrial hearings or in his brief addressing these post-trial motions how the proceedings violated his constitutional rights. Therefore, this argument is without merit.

4. The defendant contends that this court erred in failing to transfer this matter to another county. The defendant contends that there was a conflict of interest since Dauphin County has a contract with the Baltimore RH Typing Laboratory to perform all of the blood testing for paternity cases in Dauphin County. The defendant states that it was a conflict of interest for the Dauphin County courts to rule on the reliability of the blood testing performed by its own experts. The defendant also challenges the court's authority to schedule a pretrial hearing to assess the reliability of the blood tests.

The pretrial hearings were scheduled at the request of the defendant in response to his motion to dismiss. It is ludicrous to suggest that this court would evaluate the results of the blood tests in a manner favorable to the plaintiff only because the Dauphin County Domestic Relations Office has a contract with the Baltimore RH Typing Laboratory to perform these blood tests. An

independent assessment of the reliability of the blood tests was done by this court and the identity of the testing facility was not significant in any way to our determination. There was no reason to transfer this case to another county.

5. The defendant states that this court failed to follow the remand directives of the Pennsylvania Supreme Court in *Freedman v. McCandless*, 539 Pa. 584, 654 A.2d 529 (1995). The Supreme Court directed that this court conduct a hearing on the issue of whether the defendant was in contempt of this court's order when he refused to submit to blood tests.

It is inconceivable that the defendant is complaining that the court did not schedule a hearing to determine whether he was in contempt when he initially failed to show up for the scheduled blood tests. When this case was remanded from the Supreme Court, this court entered an order scheduling the defendant, the child and the plaintiff for blood tests. The defendant attended this testing. A paternity trial was eventually held and a finding of paternity was made. This allegation of error is without merit.

6. The defendant next challenges the constitutionality of 23 Pa. C. S. Section 4343(c). The defendant states that this statute which creates a rebuttable presumption that those fathers with test results of 99% or greater probality creates an arbitrary and improper classification. The defendant further states that this classification is not rationally based and the test results upon which the presumption is based are unreliable.

The relevant portions of 42 Pa. C. S. Section 4343(c) read as follows:

(c) Genetic tests.

(1) Upon the request of any party to an action to establish paternity, the court shall require the child and the parties to submit to genetic tests.

(2) Genetic test results indicating a 99% or greater probability that the alleged father is the father of the child shall create a presumption of paternity which may be rebutted only by clear and convincing evidence that the results of the genetic tests are not reliable in that particular case.

(3) To ensure the integrity of the specimen and that the proper chain of custody has been maintained, the genetic tests of the biological mother, the child or children in question and the alleged father should be conducted by an established genetic-testing laboratory in the course of its regularly conducted business activity, and certified records should be issued. The certified records shall be admissible into evidence without further foundation, authentication or proof of accuracy if no objection is made within ten days prior to trial. The laboratory must be certified by either the American Association of Blood Banks or the American Association for Histocompatibility and Immunogenetics.

This section was effective on December 16, 1994. The amendments to 23 Pa. C. S. Sections 4326, 4343 and 5103 are applicable to all actions that were pending on the effective date of this act. The defendant argues that since this case was commenced in 1990, the law that was in effect in 1990 should apply. The defendant submits that the current statute is unconstitutionally retroactive.

We would initially note that paternity actions are civil actions and are governed by the rules of civil procedure. *Schickle v. McFarlin*, 446 Pa. Super. 78, 666 A.2d 319 (1995), allocatur granted, —— Pa. ——, 674 A.2d 672 (1996). Rule of Civil Procedure 235 provides that in any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality must give notice to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and must file proof of the giving of the notice. Our review of the docket entries in this case indicates that the defendant never provided the Attorney General with notice that he was challenging the constitutionality of 42 Pa. C. S. Section 4343. Since the defendant has failed to give the requisite notice to the Attorney General, the defendant has waived his right to challenge the constitutionality of 42 Pa. C. S. Section 4343. *See: Hill v. Divecchio*, 425 Pa. Super. 355, 625 A.2d 642 (1993), allocatur denied, 538 Pa. 613, 645 A.2d 1316 (1994).

7. The defendant next contends that the court erred in permitting the jury to answer only the question as to whether the defendant had access to the plaintiff during the relevant period of conception. The defendant claims that the jury should have determined whether the plaintiff's scientific proof was reliable, whether the Baltimore RH Typing Laboratory indeed found that the probability of paternity was greater than 99% and whether the defendant, through his cross-examination of the plaintiff's experts, rebutted the presumption established by the scientific results that the defendant was the father of Grant. The defendant concludes that he was effectively denied the right to a jury trial as the result of the court's rulings. The defendant also points out that it was highly

prejudicial for the court to remark to the jury about the similarities in appearance between the defendant and the subject child.

The court instructed the jury that in paternity cases, a plaintiff must prove two elements by a fair preponderance of the evidence. First, the plaintiff must prove that the defendant had sexual intercourse at the time of conception. (N.T. 388). The jurors were instructed that they had to examine the evidence concerning access and that they could look at any similarities between the child and the defendant in making their determination. (N.T. 388). The court stated that if the jury found that the defendant had access to the plaintiff during the relevant period of conception, then they should return a verdict for the plaintiff. (N.T. 388). This instruction was based on 23 Pa. C. S. Section 4343(c)(2) which provides that a genetic test with a result 99% or greater creates a rebuttable presumption that the defendant is the father and that this presumption can only be rebutted by clear and convincing evidence that the results of the genetic tests were not reliable in that particular case. We determined that the evidence established that the genetic test results were 99.9% that the defendant was the father of this child. (N.T. 113). We further determined that the defendant had presented no independent evidence to rebut the conclusion espoused by the plaintiff [3] and that the cross-examination by the defendant's attorney was ineffective in rebutting the presumption created by the test results.

8. The defendant claims that it was error to exclude from evidence at trial the fact that the plaintiff had

---

[3] We acknowledge that the defendant was precluded by order of court from presenting expert testimony to rebut the scientific evidence put forth by the plaintiff.

four (4) prior abortions. The defendant viewed this fact as evidence of her bad character and that this was relevant cross-examination since the plaintiff had presented herself as a person who was vulnerable to the defendant's influence. The defendant argues that the number of prior abortions would have somehow attacked her credibility concerning the actual number of sexual partners she had during the relevant period of conception.

We granted the plaintiff's motion in limine and precluded any questions about the plaintiff's prior abortions.. Any sexual conduct both prior to and subsequent to the relevant period of conception was irrelevant. The question before this jury was whether the defendant had sexual intercourse with the plaintiff during the window of conception.[4]

9. The defendant further argues that the court erred in granting the plaintiff's motion in limine to preclude the introduction of any evidence of the plaintiff's sexual relations outside the relevant period of conception. The defendant argues that the sexual history of the plaintiff was relevant to show her bad character and to attack her credibility.

As stated above, the only relevant information concerning the plaintiff's sexual history was her sexual activity during the window of conception. In a paternity action, evidence of a mother's sexual activity is an extremely important fact but only at or about the time the child was conceived. *Crawford v. Burritt*, 448 Pa. Super. 250, 671 A.2d 689 (1995). The fact that a plaintiff

---

[4] We fail to understand how the defendant could argue that evidence of prior abortions was evidence of bad character. Irrespective of this court's opinion concerning the morality and propriety of abortion, the United States Supreme Court, the Pennsylvania Legislature and the Pennsylvania appellate court have determined that abortions, within certain parameters, are legal.

has engaged in premarital sex during a time that is outside the period of possible conception is irrelevant and improper due to its potential prejudicial effect. *Id.*

10. The defendant further contends that the court erred in permitting the plaintiff to introduce evidence regarding the defendant's sexual relations with the plaintiff during a period outside the relevant period. The defendant suggests that this was in contradiction to the court's order precluding any testimony regarding the plaintiff's sexual history. The defendant questions the relevance of this testimony.

At trial, the defendant denied that he had sexual relations with the plaintiff during the relevant period of conception. The defendant further stated that he knew the plaintiff only on a casual basis. (N.T. 297, 299-300). The information concerning the plaintiff's sexual history with the defendant was relevant to show the depth and extent of her relationship with the defendant. The introduction of this testimony was not precluded by our order which pertained only to testimony about the plaintiff's sexual history with other men.

11. The defendant next complains that the court erred in precluding the defendant from cross-examining the plaintiff about her other pregnancies. At trial, the defendant's attorney asked the plaintiff whether the pregnancy at issue was her sixth pregnancy. (N.T. 205). The plaintiff's objection was sustained. This question was asked in deliberate violation of the court's ruling which precluded any questions about the plaintiff's abortions. The defendant's contention that this question did not violate the court's order since the jury could infer that the children died or were given up for adoption, is ludicrous and it was an attempt to get around the court's ruling. The defendant was admonished at trial that this question violated the court's order and that any further

questions in this vein would subject the defendant to sanctions. (N.T. 206). It is inconceivable that the defendant is now raising this issue post-trial.

12. The defendant next contends that this court erred in granting the plaintiff's motion in limine precluding the defendant from introducing the fact that the plaintiff received public assistance. The defendant argues that this information was relevant to show that the plaintiff had a motive in filing the instant support action. The defendant argues that the plaintiff saw the defendant as a good catch given his occupation as an attorney and that was why she named him as a defendant.

We based our ruling on the Superior Court's decision in *Horton v. Appleby*, 333 Pa. Supr. 375, 482 A.2d 615 (1984), which held that it was error to admit evidence of a mother's receipt of public assistance in a paternity action. The defendant attempts to distinguish the *Horton* case from the instant case since the defendant in this case is an attorney. We can not understand the relevance of the defendant's occupation to the question concerning the admissibility of the plaintiff's receipt of public assistance. The defendant's occupation does not change the holding in *Horton*. Therefore, this allegation of error is without merit.

13. The defendant next contends that it was error to require the defendant to submit written offers of proof before ruling on the plaintiff's pretrial motions. The defendant submits that this caused the defendant to reveal his trial strategy to his disadvantage.

We find that this issue is without merit. It was within the court's discretion to require written offers of proof instead of making the defendant submit an offer of proof orally in court.

14. The defendant contends that the court erred in granting the plaintiff's motion in limine which precluded the defendant from presenting the defense of estoppel. The defendant maintains that the plaintiff was estopped from asserting paternity against the defendant since she gave the child Thomas Haxall's last name, she named Thomas Haxall on the child's birth certificate as the father of the child, Mr. Haxall agreed to have his name listed on the birth certificate, Mr. Haxall thought of the child as his own, Mr. Haxall was present at the birth of the child, the plaintiff took the child to California to meet Mr. Haxall's parents, the plaintiff created a family relationship among herself, the child and Thomas Haxall and she brought a support action against Mr. Haxall.

This assertion is without merit as well. We have again reviewed the Supreme Court's decision in *Freedman v. McCandless*, supra, and conclude that the issue of estoppel in this case has already been litigated and cannot again be raised in the paternity trial. The Supreme Court noted that estoppel as it applies to paternity matters is a legal determination. Id. at 591, 654 A.2d at 532. The issue of estoppel was already litigated in this court and reviewed by both the Superior and Supreme Courts. The appellate courts agreed with this court that the plaintiff had presented sufficient evidence to overcome the defendant's estoppel argument and that the plaintiff was not precluded by the defense of estoppel from maintaining this paternity action. The issue at trial was whether the defendant was the biological father of this child. The estoppel defense does not focus on who the biological father of the child is but instead focuses on the history of the relationship between the mother, the child and the other male individual. If the male individual and the child have formed such a relationship that it would be harmful to the child to have this relationship severed because this male individ-

ual may not in actuality be the biological father of the child, the courts have permitted the defendant to assert the defense of estoppel. Since it has been determined that the defense of estoppel is not applicable in this case, the defendant cannot assert this defense again at the trial on the issue of whether the defendant is the biological father of the child. The jury heard about the plaintiff's relationship with Thomas Haxall and it was their duty to determine whether the defendant was the biological father of this child even though the jury heard testimony that the plaintiff had sexual relations with Thomas Haxall during the window of conception.

15. The defendant next contends that the court erred in granting the plaintiff's pretrial motion to introduce the court order of Judge Morrison which dismissed the plaintiff's support action against Thomas Haxall.

We have reviewed the exhibits introduced by the plaintiff in this case and determine that the plaintiff never introduced the court order of Judge Morrison in the *McCandless v. Haxall* support matter. Therefore, this allegation of error is without merit.

16. The defendant states that it was error for the court to permit the plaintiff to admit into evidence the report of Dr. Bowman. The defendant claims that since Dr. Bowman was not called as a witness, his report was hearsay. The defendant states that the court erred in finding that Judith Reihart was the custodian of records and in permitting her to testify about Dr. Bowman's report. Furthermore, the defendant claims that the court erred in sustaining the plaintiff's objection to the defendant's question to Judith Reihart regarding the reliability of HLA blood testing.

This allegation of error is without merit as well. Judith Reihart is currently the supervisor of the blood bank at Harrisburg Hospital. (N.T. 27). In 1988, Harrisburg

Hospital's blood bank laboratory did paternity testing for Dauphin County Domestic Relations Office. (N.T. 29). At that time, Ms. Reihart was the supervisor of the donor center and in charge of the hematology laboratory. (N.T. 29). Ms. Reihart testified that on August 24, 1988 and October 17, 1988, Margarite McCandless, Thomas Haxall and Grant Haxall were tested by the Harrisburg Hospital blood lab. (N.T. 29). Ms. Reihart stated that the information was presented to Dr. Bowman and that he subsequently wrote a report. (N.T. 29). Ms. Reihart reported that Dr. Bowman concluded that Mr. Haxall could not be the father of this child since both Ms. McCandless and Mr. Haxall were type O and the child was type A. (N.T. 30). This testimony was admitted into evidence pursuant to the business record exception to the hearsay rule. The report was prepared in the normal course of business at the blood bank and was properly authenticated by Ms. Reihart. Ms. Reihart was permitted to testify solely as the custodian of the business records at the Harrisburg Hospital blood bank.

17. The defendant contends that the court erred in permitting the plaintiff's counsel to argue facts not in evidence during his closing argument to the jury. The plaintiff was permitted to argue the blood types of Thomas Haxall, the child and the defendant. The defendant contends that the blood types of these individuals was not in evidence and it was inappropriate for the jury to have heard these statements.

During the plaintiff's closing argument, the following ensued:

> "Mr. Porter: Now, you see, the tested man, the father of Grant McCandless, has to be an A. He has to be, because somebody had to give young Grant that A. And if that man didn't have an A, you would have had—you would have heard so

much about him not having an A blood type, you would think it was conspicuous when Thomas Haxall came in here with a helmet that said O. Do you remember that, he had an O on his helmet. Mr. Freedman would be coming in here with a flag saying O. He would have it on the back of his shirt. He would have everybody he knows coming in here to testify that he was an O. But he's an A. And if he wasn't an A, you would have heard about it. He knew he was an A back in—

Mr. Weiman: Your honor, I must object. There's been no evidence about blood type of Mr. Freedman, nor has there been any testimony regarding what the alleged father—what blood type the alleged father would have to have. Mr. Porter has gone way beyond the evidence in this case.

The Court: That might be an inference you could draw.

Mr. Porter: That's what I'm doing, Your Honor.

The Court: Overruled." (N.T. 383-384).

At trial, Mr. Haxall testified that his blood type was O. (N.T. 15). At trial, Ms. Reihart testified that the child's blood type was A and the mother's blood type was O. (N.T. 30). The plaintiff's attorney was only arguing an inference from these facts, that since the defendant did not place any evidence about his blood type, the jury could infer that he has type A blood. We determined that this was a proper inference and permitted the argument in this regard to stand.

18. The defendant next contends that the court erred in ruling on the reliability and admissibility of the evidence from the Baltimore RH Typing Laboratory since the Dauphin County Domestic Relations Office has a contract with this particular lab to perform the genetic tests in paternity matters.

As was stated above, the fact that the Domestic Relations Office has a contract with this lab to perform genetic testing in paternity cases does not create any type of a conflict of interest. It is absurd to think that this court would look favorably on the results of this lab just because Dauphin County has a contract with them.

19. The defendant states that this court violated his right to an independent and unbiased tribunal by permitting Matthew Gover, Esquire to represent the plaintiff while also representing the Domestic Relations Section of this Court.

A hearing were held on this issue on February 16, 1994. Kim Robison, the assistant director of the Domestic Relations Office, testified that Matthew Gover was hired to represent plaintiffs in paternity matters on November 26, 1990. (N.T. 20 February 16, 1994). Mr. Gover was hired to be the solicitor for the Domestic Relations Office on October 16, 1992. (N.T. 20 February 16, 1994). Mr. Gover was not hired as solicitor until after a finding of paternity was made and a support order was entered in this case. (N.T. 20 February 16, 1994). At the time that Mr. Gover was hired to represent plaintiffs in paternity matters, the Dauphin County Domestic Relations Office had a solicitor. (N.T. 32). Between November 26, 1990 and October 16, 1992, Mr. Gover only represented plaintiffs in paternity matters for the Domestic Relations Office. Mr. Gover acted in a dual capacity from October 16, 1992 until Mr. Porter was hired in April, 1993. (N.T. 101 February 16, 1994). It was clear that Mr. Gover did not act in this dual capacity until after an order of paternity was entered against the defendant and an order of support was entered. (N.T. 18-20 February 16, 1994). There was no commingling of adjudicative and adversarial functions by Mr. Gover

during the relevant time period. Therefore, there is no basis for this allegation of error.

20. The defendant argues that the court violated his constitutional right to an independent and unbiased tribunal by permitting George Porter, Esquire to represent the plaintiff while also representing the Dauphin County Domestic Relations Office. This allegation of error is without merit since Mr. Porter never represented the Dauphin County Domestic Relations Office and has only been employed to represent plaintiffs in paternity matters.

21. The defendant contends that the jury verdict was against the weight of the evidence and that the evidence was insufficient to sustain the verdict.

The issue before the jury was whether the defendant had access to the plaintiff during the relevant period of conception. The plaintiff testified that she had intercourse with the defendant on December 25, 1986. (N.T. 159). She stated that Mr. Freedman called her on Christmas Day, stated that he was lonely since it was the first Christmas since his divorce and he was alone and invited her to come to his house. (N.T. 162). She agreed and they decided to rent a video. (N.T. 162). She testified that they drove to a video store on Chocolate Avenue in Hershey and that the defendant selected a pornographic movie. (N.T. 162-163. They returned to the defendant's house, watched the movie, drank some champagne and used drugs. (N.T. 163, 195, 197). They eventually engaged in sexual intercourse without the use of any birth control. (N.T. 164). The plaintiff had her last menstrual period on December 6, 1986. (N.T. 158). The plaintiff realized that she was pregnant on January 8, 1987. (N.T. 164). The plaintiff presented the testimony of Joyce Stough, an employee of the video store during the relevant time period, who testified that she remembered that

this store was open on Christmas Day and that the defendant was a frequent patron. (N.T. 353-354). This witness remembered this very well because her nephew was born on Christmas Eve of that year and she remembered driving with her parents on Christmas Day to visit her sister in law in the hospital. (N.T. 357-358). On the way from the hospital, she noticed that the video store was open and she remembered thinking it was dumb for the store to have been open on Christmas Day. (N.T. 359). The defendant testified that he was with his family on Christmas Day of 1986 and he denied seeing the plaintiff and having sexual intercourse with the plaintiff during the time that conception occurred. (N.T. 296). The issue concerning whether the defendant had assess to the plaintiff during the window of conception required the jury to access the credibility of the parties. The assessment of the witnesses is solely within the province of the jury.

We have reviewed the trial testimony and conclude that the evidence was sufficient to sustain the verdict and that the verdict was not against the weight of the evidence.

22. Finally, the defendant contends that the court erred in qualifying Terry Houtz as an expert witness. Mr. Houtz was offered as an expert in HLA testing. Mr. Houtz testified that he last received formal training in blood testing in 1969 while he was in the military. Mr. Houtz was only a high school graduate and had no secondary or post-graduate degree in HLA blood testing. Furthermore ,the defendant contends that the court erred in permitting Mr. Houtz to testify that HLA testing was genetic testing.

Mr. Houtz was a medical technologist for over 30 years. (N.T. 37). He was trained in the United States Air Force in blood banking, chemistry, hematology and

bacteriology. (N.T. 37). He worked for the University of Maryland Hospital as a research scientist doing research in the area of HLA testing and organ transplantation. (N.T. 37). He testified that he passed a written examination given by the federal government that certified him as a medical technologist. (N.T. 37). He sat for the board certification as a specialist in HLA testing given by the American Association of Clinical Histocompatibility Testing. (N.T. 37). He attended and participated in numerous workshops and seminars given by the International Society for Forensic Hemogenetics, the American Association of Clinical Histocompatibility Testing, American Association of Blood Banks and seminars at Duke University and the Johns Hopkins University. (N.T. 37). He is a member of the International Society for Forensic Hemogenetics and American Association of Clinical Histocompatibility Testing. (N.T. 38). He has published approximately sixteen papers that were presented at scientific meetings or were published in scientific journals on the subject of paternity testing. (N.T. 38). He stated that he has been qualified approximately seven to eight hundred times as an expert witness in paternity testing. (N.T. 38).

Mr. Houtz had the requisite training, education and experience to be qualified as an expert witness. This allegation of error is without merit.

Accordingly, we enter the following:

ORDER

AND NOW THIS 6 day of December, 1996, the post-trial motions filed on behalf of the defendant are hereby *DENIED* and the defendant is directed to appear at the Office of Domestic Relations for a support conference

for a determination of child support effective as of the date the original petition for support was filed.

BY THE COURT:

/s/ Todd A. Hoover
Todd A. Hoover
Judge

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 291 Harrisburg 1998

MARGARITE J. MCCANDLESS,
Appellee

vs.

PHILIP FREEDMAN,
Appellant

Appeal from the Order entered February 9, 1998
in the Court of Common Pleas, Family Division,
Dauphin County, at No. 447 DR 90

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Dauphin County be, and the same is hereby Affirmed.

BY THE COURT:

/s/ [Illegible]
Prothonotary

Dated: October 14, 1998

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 969 M.D. Allocatur Docket 1998

MARGARITE J. MCCANDLESS,
Respondent

v.

PHILIP FREEDMAN,
Petitioner

Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 11th day of May, 1999, the Petition for Allowance of Appeal is hereby DENIED.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS SECTION

No. 447 DR 90
Civil Action—Paternity

Jury Trial Demanded

MARGARITE J. MCCANDLESS,
Plaintiff

v.

PHILLIP FREEDMAN,
Defendant

RULE 235 NOTICE TO ATTORNEY GENERAL

NOW COMES defendant, Philip D. Freedman, and provides notice to the Attorney General of the Commonwealth of Pennsylvania that an Act of Assembly is unconstitutional:

1. The act of 1985, Oct. 30, P.L. 264, No. 66, § 1, as amended 1989, Dec. 20, P.L. 654, No. 81, § 1, as amended 1994, Dec. 16, P.L. 1286, No. 150, § 2 is unconstitutional for the following reasons:

> The paternity statute, 23 Pa.C.S.A. § 4343 is void for vagueness. Section 4343 (c)(3) requires that tests be performed by "an established genetic testing laboratory . . . certified by either the American Association of Blood

Banks or the American Association for Histocompatibility and Immunogenetics." An "American Association For Histocompatibility and Immunogenetics" does not exist. The American Association of Blood Banks has no certification program only an accreditation program. The paternity statute is void for vagueness in failing to provide an effect of test results that fail to indicate a 99% or greater probability.

The 99% classification of the paternity statute is not rationally based and is not related to a legitimate state interest sufficient to override a defendant's constitutional right to equal protection and due process.

The conclusive presumption of the paternity statute violates due process of law. The presumption excludes a defendant from establishing non-paternity on the merits such as by showing that paternity is impossible by establishing exclusion by other reliable testing or by showing non access. The presumption is not rationally based because paternity testing is subjective.

The paternity statute is unconstitutionally retroactive in its application to pending cases and violates due process. The statute gives a legal effect different from that under the law in effect when the incident occurred.

The shift in the burden of proof from a preponderance of evidence on the plaintiff to a conclusive presumption against a defendant violates due process.

The paternity statute unconstitutionally denies a defendant a right to trial by jury in a case involving serious criminal type consequences.

The paternity statute unconstitutionally removes determination of the ultimate issue of fact, i.e., paternity, from the hands of the fact finder.

2. Attached to this Notice is a copy of the pleading raising the issues.

Respectfully submitted,

PHILIP D. FREEDMAN
6000 Wescott Hills Way
Alexandria, Virginia
22315-4747
(703) 838-9181

Dated: _____

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS SECTION

No. 447 DR 90
Civil Action—Paternity
Jury Trial Demanded

MARGARITE J. MCCANDLESS,
Plaintiff

v.

PHILLIP FREEDMAN,
Defendant

PROOF OF GIVING OF NOTICE UNDER RULE 235

I, Philip D. Freedman, do hereby certify that on December 28, 1995, defendant's RULE 235 NOTICE TO ATTORNEY GENERAL together with a copy of defendant's MOTION TO EXCLUDE EVIDENCE was served on the Attorney General by certified mail return receipt requested at the following address:

Office of Attorney General
Commonwealth of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, Pennsylvania 17120

The signed return receipt is attached to this certification as proof of service on December 28, 1995.

/s/ Philip D. Freedman
PHILIP D. FREEDMAN
6000 Wescott Hills Way
Alexandria, Virginia
22315-4747
(703) 838-9181

Date: 12/30/1995

BEST AVAILABLE COPY

'DER:

- ete items 1 and/or 2 for additional services.
- ete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this rd to you.
- ach this form to the front of the mailpiece, or on the back if space does not rmit.
- te "Return Receipt Requested" on the mailpiece below the article number.
- e Return Receipt will show to whom the article was delivered and the date vered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Addre
2. ☐ Restricted Delivery

Consult postmaster for fee.

rticle Addressed to:

fice of Attorney General
ommonwealth of Pennsylvania
6th Floor
trawberry Square
arrisburg PA 17120

4a. Article Number
P 116 721 307

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Deli DEC 2 8 1995

5. Received By: (Print Name)
Phyllis

6. Signature: (Addressee or Agent)
X

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994 Domestic Return Receipt

[Docket Entries from the Court of Common Pleas
of Dauphin County, Pennsylvania]

December 28, 1995 - Order, filed. AND NOW, this 21st day of December, 1995, upon consideration of Defendant's Motion, said Defendant shall be permitted to review the Domestic Relations file and shall contact the Domestic Relations Office within ten (10) days of the date of this Order to schedule a mutually convenient date to do the same./s/Hoover,j

January 5, 1996 - Proof of Giving of Notice Under Rule 235, filed.

January 16, 1995 - Defendant's Motion To Discover Further Medical Records, Verification, Exhibits, Certificate of Service, filed.

Janaury 17, 1996 - Order, filed. AND NOW, this 12th day of January, 1996, upon consideration of Defendant's Second Motion for Rule 4019 Sanctions, said Motion is hereby DENIED. The Motion to Exclude Evidence shall be considered a Motion in Limine and dealt with at the time of trial. The Motion to Dismiss shall be dealt with immediately prior to trial./s/Hoover,j

*** December 29, 1995 - Defendant's Second Motion For Rule 4019 Sanctions, Verification, Certificate of Service, filed.

**** December 29, 1995 - Defendant's Motion To Dismiss, Verficiation, filed.

***** December 29,1995 - Defendant's Motion to Exclude Evidence, Verification, filed

**December 29, 1995 - Application For Disqualification of Judge, Verification, Certification Of Service, Filed.

*December 29, 1995 - Defendant's Motion For Oral Argument Under Rule 211 Of the Pennsylvania Rules Of Civil Procedure, Certification Of Service, Filed.

January 18, 1996 - Order,filed. AND NOW, this 16th day of January, 1996, upon consideration of Defendant's Application for Disqualification of Judge, the said Application is hereby DENIED. This Court has no recollection of a phone conversation with Mr. Freedman's counsel as set forth in the Petition. Furthermore, we have no recollection of any discussion and concomitantly have no recollection of discussing any matters about this case with Mr. Freedman's first counsel fo record in 1990. Accordingly, there is no basis for disqualification of this Court./s/Hoover,j

January 10, 1996 - Order Of Court, filed. Upon consideration of the "Motion For Release Of Blood Test Information" filed by plaintiff Margarite McCandless, a Rule is issued upon Defendant Philip D. Freedman to show cause, if any he may have, why the relief requested in said petition should not be granted. Rule returnable within five (5) days after service upon Defendant Philip D. Freedman. /s/ Todd Hoover, J.

January 23, 1996 - Order, Defendant's Motion To Discover Further Medical Records, Filed. Upon consideration of Defendant's Motion to Discover Further Medical Records, sais Motion is hereby DENIED. /s/ Todd Hoover, J.

January 30, 1996 - Defendant's Motion to Disqualify Plaintiff's Counsel, Verification, Exhibits, Certification of Service, filed.

January 30, 1996 - Defendant's Response to Rule to Show Cause Why Blood Test Information Should Not Be Released, Certidication of Service, Exhibits, filed.

January 30, 1996 - Defendant's Third Motion For Rule 4019 Sanctions, Certification of Service, Exhibits, filed.

January 30, 1996 - Motion For Release of Information, Certificaiton of Service, Exhibits, filed.

February 8, 1996 - Defendant's Motion To Strike Plaintiff's Motion For Release Of Blood Test Information, Certification Of Service, Filed.

February 8, 1996 - Motion For Severance, Verification, Certification Of Service, Proposed Order Of Court, Filed.

February 8, 1996 - Defendant's Brief - Motion For Severance, Filed.

(CONTINUED ON PAGE 6)

[Radioautograph Copies of Genetic Test Results]

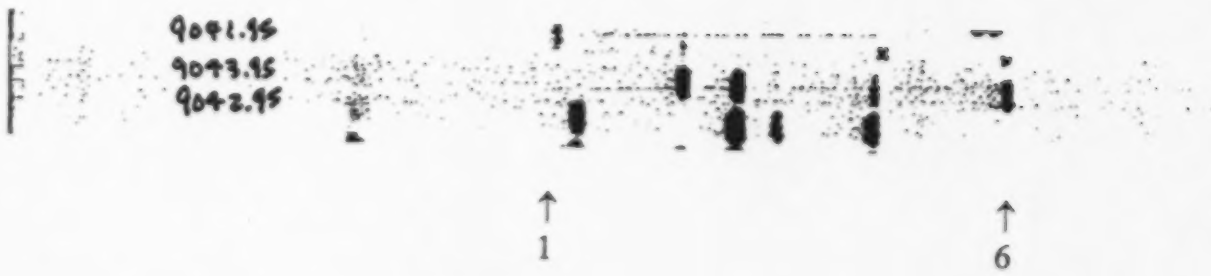

Figure 1 (Exhibit D7)

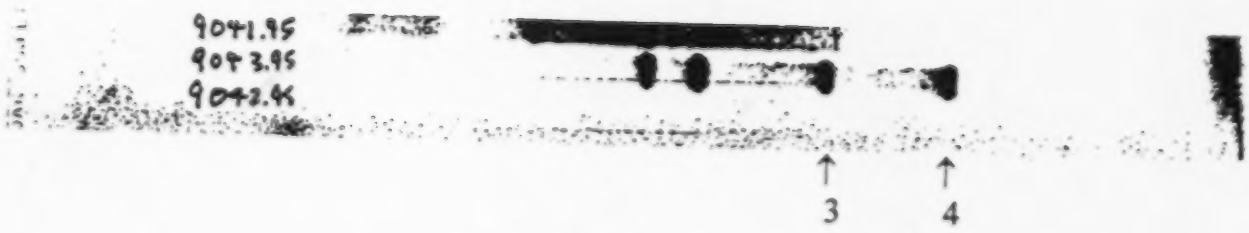

Figure 2 (Exhibit D9)

[Excerpt from Motion for Reconsideration and to Exclude Evidence—Defendant's Brief]

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS SECTION

No. 447 DR 90
Civil Action—Paternity

Jury Trial Demanded

MARGARITE J. MCCANDLESS,
Plaintiff

v.

PHILLIP FREEDMAN,
Defendant

MOTION FOR RECONSIDERATION
AND TO EXCLUDE EVIDENCE

DEFENDANT'S BRIEF

* * * *

E. The Baltimore tests were procured in violation of Freedman's constitutional right to an independent and unbiased tribunal, by a Domestic Relations Section acting in an improper adversarial capacity on behalf of McCandless and by an *improper commingling of adjudicative and adversarial functions by counsel*

Freedman continues to be denied access to an independent and unbiased tribunal.

Gover is now solicitor for the Domestic Relations Section of the Court. Robison continues as assistant director of the Domestic Relations Section.

Porter, the new counsel for McCandless, occupies the same position as Gover. Porter acts as the prosecutor for the Domestic Relations Section of the Court and represents complainants in *both* support and paternity matters. Porter is provided with the Domestic Relations file in both support and paternity matters.[7] Porter schedules hearings on behalf of Domestic Relations in both support and paternity matters. Porter acts as counsel for the purported independent testing lab appointed by the Court. Porter maintains a special relationship to the Court that permits him to obtain blood test orders.

In the present case without prior notice to Freedman, Porter petitioned for and obtained a very unusual blood test. The blood test directed *both* HLA and DNA testing. As shown on the attached invoice (Exhibit 15), RDC and HLA testing is usually conducted by Domestic Relations. RDC and HLA testing costs Domestic Relations $95 per test. The combination of HLA and DNA testing is much more expensive at $130 per test. Nonetheless,

---

[7] On August 10, 1995, Freedman attended a hearing in this case in Dauphin County. That day, Porter conducted both support and paternity hearings before the Domestic Relations Judge. Porter had a stack of files in his possession. During the proceedings, Porter referred to the files for information concerning both paternity and support cases. Kim Robison, assistant director of the Domestic Relations Section of the court, also was in attendance, standing across from Porter with intervening counsel tables.

At one point in a paternity matter, Porter was unable to locate a relevant document from a file in the stack of files. Robison crossed the room and immediately located and retrieved the document from the file. The file was the Domestic Relations file from a stack of Domestic Relations files that Porter was using to "prosecute" both paternity and support matters. The file was the Domestic Relations file and Porter had complete access to the file.

Porter was able to obtain the more expensive testing merely by filing a proposed order with the Court.

A combination of genetic tests can be used to construct a higher paternity index than one test alone. The intention of Porter and Domestic Relations appears to have been to select a test to accomplish a non rebuttable 99% probability.

A combination test of HLA and DNA to construct a high probability is improper. No scientific evidence exists to establish that genetic fragments detected by HLA testing are different from the fragments measured by DNA. Supposing a detected DNA fragment is found one time out of four in an unrelated individual. The probability of a match is ¼. If another fragment is detected and that fragment is completely unrelated to the first, it's probability can be properly multiplied by the first probability to obtain a higher probability. See Kaye, *supra* at pages 299-300. For example, if the probability of a match of the second fragment is ¼, the probability of a match of *both* fragments by an unrelated individual is (¼)(¼) or 1/16. The probability of finding the combination of *both* fragments in an unrelated individual is 1 in 16. In paternity terms, only 1 out of 16 persons could have contributed both fragments to a child.

However, multiplying index' from different HLA and DNA tests is incorrect methodology. A DNA test directly measures alleles. HLA testing detects characteristics of alleles. No scientific evidence exists to establish with any degree of certainty that the DNA measured alleles are different from the HLA detected alleles. The probabilities from fragments from a combination HLA/DNA test can be probabilities for the same fragments multiplied together. The scientific community rejects combination

probabilities from HLA/DNA testing as unacceptable scientific methodology. See Jefferys, *Highly Variable Minisatellites and DNA Fingerprints*, 15 Biochem Soc'y Trans., 309, 314 (1987). Multiplying probabilities together to obtain a much higher paternity index in the present case is incorrect.

Additionally and more importantly in this case, Baltimore ignored genetic evidence that *excludes* Freedman. Baltimore not only improperly constructed a high paternity index by improperly multiplying probabilities of genetic fragments that may be related genetic material, but Baltimore ignored excluding genetic information. Where a tested subject is excluded, the probability is zero and the paternity index is zero, e.g., $(¼)(¼)(0) = 0$. See Kaye, *supra*. The Baltimore tests establish a paternity index of zero but Baltimore reported a probability of 99.99%. The May 23 1995 Order of Court directing Freedman to appear for blood testing was petitioned for and obtained by counsel for McCandless in his dual capacity in representing both McCandless and the Domestic Relations Section of the Court and the Domestic Relations Judge signed the Order. The testing results provide a false and non rebuttable probability under the paternity statute. Selection of this particular combination of testing and failure to consider excluding genetic evidence creates an appearance of bias and impropriety.

The Pennsylvania Supreme Court has stated "[A] predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process . . . Merely, 'a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true' is sufficient." *Lyness v. Com. State Bd of Medicine*, 529 Pa. 535, 605 A. 2d 1204, 1208 (1992) (quoting *In re Schlesinger*, 404 Pa. 584, 598,

172 A.2d 835, 841 (1961)). "[T]he impartiality of the court, which is a fundamental prerequisite of a fair trial, must be deemed compromised by appearance alone, thus eliminating the need for establishing actual prejudice." *In Interest of McFall,* 533 Pa. 24, 31, 617 A.2d 707, 711 1992). In *Lattimer v. Johnson,* 1 Bradford County L.J. 58 (1992), the Court held that it was improper for counsel who represented a Domestic Relations Office to represent a complainant at a support conference.

Both the January 1992 and the May 1995 Orders of Court directing Freedman to appear for blood testing were illegal and the subsequent June 13, 1995 blood drawing of blood from Freedman was an illegal search and seizure in violation of the Constitutions of the United States and of this Commonwealth. The July 17, 1995 Baltimore report should be excluded.

* * * *

G. *The Pennsylvania Statute Is Unconstitutional*

(1) Introduction

Due process encompasses elements of equality and requires that defendants be treated with "fundamental fairness." *Gagnon v. Scarpelli,* 411 U.S. 778, 790, 36 L.Ed.2d 656, 93 S.Ct. 1756, 1763 (1973). The Baltimore report is not admissible. The paternity statute is void for vagueness because the statute does not provide clear guidelines to enforcement of its provisions. See *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, (1972). The paternity statute violates the equal protection clause by creating an arbitrary classification that is not nationally based, See *Tate v. Short,* 401 U.S. 395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971), and unfairly prejudices the defendant, See *Gagnon.* The paternity statute creates a conclu-

sive presumption that violates due process. See *Vlandis v. Kline,* 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230, 2237 (1973). The statute creates a burden of proof that violates due process. See *Rivera v. Minnich,* 483 U.S. 574, L.E.2d , S.Ct. (1987). The paternity statute violates due process by retrospective application to already pending cases. See *Paulussen v. Herion,* 359 Pa.Super. 520, 519 A.2d 473 (1986), *appeal denied* 515 Pa. 614, 53 A.2d 868.

The state has an interest in determining and enforcing support. However, that interests is different and should not be confused with paternity.

A support action sets an amount of an obligation in respect of a relationship that is established, i.e. obligor and obligee, or enforces that obligation. A paternity case may involve (as in the present case) unrelated parties. A paternity action is a civil action to determine whether a legal relationship should be established. In a support action, the relationship—obligor and obligee—is established; only the amount of an obligation or fulfillment of an obligation is at issue. A paternity action relates to a proposed alteration in the status existing among parties. A paternity action involves substantial individual rights that transcend interests of the state at this point in the proceedings. Substantial constitutional rights are implicated in the extraction of blood samples, *Christianson v. Ely,* 390 Pa.Super. 398, 568 A.2d 961 (1990), and in the resolution of questions of paternity, *Koleski v. Park,* 363 Pa.Super. 22, 525 A.2d 405 (1987).

The creation of a parent-child relationship involves substantial and protectable familial interests. *Corra v. Coll,* 305 Pa.Super. 179, 451 A.2d 480 (1982). A paternity action is not the same as a support action and the state's interests are substantially different in a paternity

action from those in a support action where paternity and its consequential obligation have already been established.

The paternity statute provides that in instances of 99% or greater probability, paternity is conclusively established. The paternity statute creates a classification that eliminates the distinction between paternity and support. The paternity statute is invalid.

(2) Paternity Statute Classification Violates Equal Protection And Due Process Of Law

Since December 16, 1994, the paternity statute no longer addresses genetic test results that indicate less than 99% probability. Genetic test results indicating a 99% or greater probability create a presumption of paternity that may be rebutted "only by clear and convincing evidence that the results of the genetic tests are not reliable in that particular case."

The statute creates a classification between defendants whose test results indicate a 99% or greater probability and defendants whose test results indicate less than 99% probability. The first class of defendants are prohibited from contesting paternity on the merits. The first class are prevented from arguing that other testing excludes them as a parent or that they did not have sexual relations with the mother or that the mother's claim is frivolous. Genetic testing results are not admissible for any purpose against the second class of defendants. The classification is improper because paternity testing is reliable only for exclusion purposes and because the classification designation, i.e., the paternity probability, is subjectively determined.

(1). Paternity Testing Is Unreliable

Legislative history provides no insight to interpret the intent of the legislative in passing the 1994 amendment.

The legislature may have passed the paternity amendment on the reputation of accuracy of genetic testing in the identity field. Pedigree (paternity) testing does not share that reputation. Pedigree testing is considered by most experts only as a tool for determine exclusion. See Kaye *supra.*

(ii) The Classification Is Not Rationally Based

A statute must bear a rationale relationship to an interest that a state seeks to promote. See *Plowman v. Com. Dept. Of Transp.*, 535 Pa. 314, 635 (A.2d 124 (1993).

The scientific premise for pedigree (paternity) genetic testing is contradictory to the premise of identity genetic testing. The premise for identity genetic testing is that every person's genetic constitution is unique from that of every other person (including brothers, fathers, uncles, counsins, etc.). The premise for paternity genetic testing is that identical genetic information is shared between a child and an alleged father. The premises are contradictory.

The validity of paternity testing depends on an assumption that all possible partners of the mother are unrelated. The validity depends on the assumption that all of the partners pass genetic fragments (alleles) to the child randomly as opposed to a relationship with one another that may result in the sharing of genetic material. This assumption is never totally correct.[9] In the present case, the assumption is invalid. In the present case, both the paternal and maternal families of the alleged father are large and have resided in the central Pennsylvania area for centuries. Persons in the central Pennsylvania area

---

[9] All genetic testing is flawed in at least this one respect. Genetic testing depends on matching frequencies that assume *unrelated* individuals.

that share genetic material with the alleged father may number in the millions. It is more probable than not that possible partners of the mother share this same genetic material. The extent of the sharing is unknown but clearly invalidates probabilities based on assumptions of randomness. Hence, reliable scientific authorities accept paternity testing only for exclusion purposes. See Kaye, *supra.*

Paternity testing is subjective. The language of the paternity statute places no restraints on a tester and provides no guidance to a tester to fairly conduct the tests. In the present case, the tester ignored accepted scientific methodology. The tester postulated a paternity probability on the basis of subjectively selected genetic evidence. The tester ignored accepted error considerations. The tester selected a population group that is unrelated to the central Pennsylvania region. The tester ignored proper procedure in conducting the tests. The tester failed to adhere to accepted scientific methodology in combining probabilities of tests to construct a non rebuttable high probability. The tester selected all variable to determine a classification to apply to the defendant to prevent him from contesting paternity.

Genetic testing is arbitrary and subjective. Determining a test result difference between a 99% probability and less than a 99% probability is within the subjective whim of the tester who conducts the test and within the subjective whim of test assumptions. Probabilities are substantially changed by assumptions of gene frequencies within a population, test presumptions of a single alleged father, assumptions of assignments of phenotypes, of size of data base used to determine probabilities, of verification choice and measurement error. Testers, properly or imroperly, make assumptions that determine exclusion verus non-exclusion. Even assuming non-exclusion, a

tester can make assumptions that change probabilities of paternity by as much as 15-50%. See Reading et al., Mayersak (II) and Lewontin & Hartl *supra.* These assumptions are not uniformly accepted by the scientific community and in most non-exclusion situations are rejected for failure to conform to sound scientific methodology.

The testers are not impartial. The state has enormous incentives to determine paternity in the form of Government "bounty" paid to state agencies that achieve prescribed percentages of paternity findings. See the Social Security Act, 42 U.S.C.A. § 652(g). The testers are retained by the state to conduct the testing. The state will not continue to retain testers that fail to consistently provide test results that establish paternity. The system includes substantial incentives to testers to exercise subjectivity in a manner contrary to sound science.

The paternity statute creates an arbitrary classification that is not rationally based. The percentages provided in blood testing are subjectively and arbitrarily determined. Using blood test percentages to determine a classification of paternity presumption is a violation of equal protection and due process. See *Tate v. Short,* 401 U.S. 395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971).

(3) The Conclusive Presumption Of The Paternity Statute Violates Due Process 0f Law

The paternity statute provides that "[g]enetic test results indicating a 99% or greater probability . . . shall create a presumption of paternity. . . ." The language of the statute does not permit overcoming the presumption by proof relating to the merits of the case, e.g., that an alleged father did not have access to the mother or that independent test results exclude the alleged father. The presumption encourages spurious and baseless charges.

The presumption encourages unscrupulous mothers who may not know the identity of a father to "go down a list of prospective deep pockets" until an alleged father is selected who does not pass a test. The presumption violates due process. See *Cleveland Bd. Of Educ. v. LaFleur,* 414 U.S. 632, 645, 39 L.Ed.2d 52, 94 S.Ct. 791, 799 (1974); *Vlandis v. Kline,* 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1973).

Stahli v. Wittman, 421 Pa.Super. 281, at 287-288 (1992) states:

> Typing red and white cell antigens reveals the extent to which an alleged father and child share selected cellular, biochemical properties. The results of such tests provide circumstantial evidence of genetic similarity. From the results of blood cell antigen tests it is sometimes possible to deduce, with a high degree of reliability that an alleged father is not the biological father. See: 42 Pa.C.S. § 6136; *Tyler v. King, supra* at 86, 496 A.2d at 20 (1985) citing *Hummel v. Smith,* 301 Pa.Super. 276, 286-287, 447 A.2d 965, 970 (1982) (Beck, J., concurring). *It is never possible from the same tests, however, to deduce with the same certainty that a particular man fathered a particular child* [emphasis added]. See. *Smith v. Shaffer, supra* 511 Pa. At 426, 515 A.2d at 529, citing *Connell v. Connell,* 329 Pa.Super. 1, 7, 477 A.2d 872, 874-875 (1984). When body cell typing fails to exclude paternity, a statistical calculation can be made to estimate the likelihood of paternity.
>
> This calculation entails the use of a probability formula known as the "Essen-Moller" version of the "Bayes' Theorem." A simplified version of this formula may be summarized as follows: The ratio of

> the likelihood that the accused contributed certain genetic characteristics identified in the child, to the likelihood that one other "random man" contributed them. The "random man" variable is derived from the estimated frequencies of the particular characteristics in the relevant population. The ratio yielded by the Bayes' formula, called the "paternity index," is converted into a percentage value, "the likelihood of paternity," which is then presented to the trier of facts [citations omitted].
>
> Even where this calculation yields a high probability of paternity, there nevertheless exists in the population of men having the same racial-ethnic background a number of men who, upon testing, will yield the same or similar results.
>
> Blood cell typing provides some evidence from which a fact finder may make an affirmative finding of paternity [citations omitted]. However, *the result is not prima facie evidence of paternity* [emphasis added]. Before the result of a blood test becomes probative of affirmative paternity, the trier of fact must be able to conclude that the mother and alleged father engaged in the reproductive act at a relevant time [citations omitted]. *Blood test results are not a substitute for this threshold determination* [emphasis added].

The Pennsylvania Superior Court has expressed reservations about the value of genetic testing. The Legislature seeks to make genetic testing conclusively presumptive. The paternity statute substitutes blood test results for all threshold determinations including whether the parties engaged in the reproductive act. According to the statute, a man who never knew a mother may be chosen by her as a father on the basis that he has some genetic characteristics in common with a child.

Since the presumption is conclusive, paternity test findings of 99% and above invariably establish paternity without further proceedings. Avoiding further proceedings saves the state money. The tester is under pressure to provide a report that not only establishes a probability of paternity but provides results of 99% and above.

In the present case, Freedman will show that he did not engage in sexual relations with the child's mother. Freedman establishes in this brief that the same tests that Baltimore conducted and interpreted as establishing a 99% probability of paternity, in fact exclude Freedman. The application of a conclusive presumption could be interpreted to deny Freedman his right to fairly litigate the issue of paternity. The conclusive presumption of the paternity statute violates due process of law.

(4) Change In The Burden Of Proof Violates Due Process Of Law

In *Minnich v. Rivera,* 509 Pa. 588 (1986), *affirmed* 483 U.S. 574, the Pennsylvania Supreme Court considered an argument that the preponderance of the evidence standard in paternity cases violates due process. The Court found that the legislature could prescribe a standard so long as the standard did not violate due process. *Minnich* at page 592. The Court quoted from *Commonwealth v. Wright,* 508 Pa. 25, 494 A.2d 354 (concurring opinion by Larsen, J. in which the majority joined), citing *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979):

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual

> conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

The test report in the present case is highly unreliable. The proper interpretation of testing in this case is exclusion. The burden is placed on the defendant to rebut a conclusive presumption. The burden violates due process because it is conclusive and because it dictates an opposite result from the correct result. Society does not require a finding of paternity for a father who is excluded. The standard of proof does not "instruct the fact finder concerning the degree of confidence our society should have in the correctness of factual conclusions for this type of adjudication. A conclusive burden of proof is not the same burden of preponderance approved in *Minnich.* The conclusive burden violates due process of law.

(5) The Paternity Statute Is Unconstitutionally Retroactive

A statute violates due process when it relates back to give a previous incident a legal effect different from that which it had under the law in effect when the incident occurred. *McMahon v. McMahon,* 417 Pa.Super. 592, 612 A.2d 1360 (1992).

This paternity action was brought in 1990. At that time, the paternity statute provided that genetic test results shall be considered *prima facie* evidence of paternity. The present case was appealed to the Pennsylvania Supreme Court, which reversed a Dauphin County decision that had been entered in violation of Freedman's right to due process. While the case was pending in the Supreme

Court, the legislature (December 1994) amended the paternity statute to provide that 99% results conclusively establish paternity. The legislature provided that the amended paternity statute "shall apply to all actions pending on the effective date of this act." Section 5, of Act 1994, Dec. 16, P.L. 1286, No. 150.

Trial in this case will establish that Freedman did not have sexual relations with the complainant. Trial will establish that Freedman cannot be the father of the child. Freedman will establish these facts to overcome any *prima facie* blood test evidence. According to *Stahl, supra,* the blood tests have no probative value in this case. However, the provisions of the paternity statute amendments now present Freedman with a different burden of proof. The statute may result in a legal effect different from that which it had under the law in effect either at the time this action was brought or at the time of conception of the child. The paternity statute violates due process.

(6) The Pennsylvania Paternity Statute Creates An Unconstitutional Non Rebuttable Presumption And Denies Defendant A Right To A Jury Trial

A defendant has a right to trial by jury in cases involving the possibility of imposition of criminal type penalties. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The non rebuttable presumption of paternity with probabilities of 99% and higher prevents a defendant from contesting paternity in a jury trial (or in any trial for that matter). The presumption unconstitutionally denies a defendant a right to a jury trial.

* * * *